

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

SYNGENTA CROP PROTECTION,  
INC.,

Civil Action  
No. 1:15V274

Plaintiff,

vs.

Greensboro, North Carolina  
June 6, 2017  
9:45 A.M.

WILLOWOOD, LLC, WILLOWOOD  
USA, LLC., WILLOWOOD  
AZOXYSTROBIN, LLC, and  
WILLOWOOD LIMITED,

Defendants.

TRANSCRIPT OF MOTIONS PROCEEDINGS  
BEFORE THE HONORABLE CATHERINE C. EAGLES,  
UNITED STATES DISTRICT JUDGE

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PROCEEDINGS

(THEREUPON, the following proceedings were had:)

THE COURT: Good morning. We're here on Syngenta versus Willowood, 15CV274 for first, two pretrial conferences. I believe counsel have been given my rough agenda for what I hope to accomplish today. It is kind of a long list, but most of it is things I anticipate we'll deal with in July.

I have read everything in connection with Willowood's motion to exclude Dr. Wilner's testimony and Syngenta's motion on expert testimony related to commercial reasonableness. So those are the primary things I believe we'll be dealing with today.

Since both of those motions -- well, one of them exclusively deals with damages and the other one at least partly, perhaps largely deals with damages, I thought it would be helpful to me to have each side give me an overview of how they see the damages issues playing out and what their perspective positions are going to be at trial.

So if we could take about ten minutes to do that, it would be helpful to me to give me a little broader context before we move directly into those motions.

Let me just have everybody identify themselves for the court reporter before we get started.

MR. COUGHLIN: Richard Coughlin on behalf of Syngenta. Along with me is Mr. Levin, Mr. Santhanam and

1 Mr. Pierce.

2 THE COURT: All right. Good. Thank you.

3 MR. DUNCAN: Your Honor, Alan Duncan with Steve  
4 Tiller on behalf of Willowood.

5 MR. SANTHANAM: Your Honor, we provided to the Court  
6 a slide deck and we'll be referring to some of the slides and  
7 be jumping around. For purposes of our discussion at the  
8 moment, if we can go to slide four.

9 In terms of the damages case and the roles of experts  
10 in patent cases, nearly every case that is decided that has a  
11 damages position report is going to get back the damages  
12 position report by an expert. So the case law essentially that  
13 sets out what the damages law is, is a culmination of what  
14 experts have done in past cases.

15 Where we would start off is with the statute, Section  
16 35 U.S.C. 284. That statute defines what a patentee, patent  
17 holder such as Syngenta is entitled to. It sets the floor on  
18 damages to be a reasonable royalty. But what is important for  
19 this case is, that the damages should be adequate to compensate  
20 for the infringement.

21 To jump in really quickly to what that means and to  
22 provide a quick overview, adequate compensation has been very  
23 broadly interpreted and it also has been interpreted such that  
24 it does not depend upon whether or not the accused infringer  
25 has gained or lost.

1           What I would highlight for the Court before we jump  
2 into the overview of the damages case is that going back to a  
3 couple early Supreme Court cases, *Yale Lock* case, the *Coupe*  
4 *versus Royer* case, they set forth the fundamental principles,  
5 which is, in terms of adequate compensation what you are  
6 talking about is the difference between what a patent owner --  
7 where the patent owner was in terms of his pecuniary condition  
8 after the infringement, and where he would have been but for  
9 the infringement, and that's without regard to the question of  
10 whether or not the defendant gained or lost.

11           I would also highlight the last case that is cited  
12 here on slide five, which is the *King Instruments* case which  
13 indicates that there is no limitation on the types of damages  
14 or the types of harm that can be compensated for.

15           If Your Honor will humor me for one more minute. In  
16 terms of what can be supported for a damages case, the law is  
17 clear that lost profits is a recognized form of damages and it  
18 can fall within a couple of different categories. It can be  
19 diverted sales, price erosion, but for purposes of an expert,  
20 the case law sets out what the patentee must prove is, that the  
21 patentee has to establish a reasonable probability that but for  
22 the infringement, that they would have made the sales or that  
23 their prices would have been higher, et cetera. So what the  
24 standard is, is that it is the reasonable probability.

25           With that in mind, how have, you know, courts

1 established that reasonable probability. Well, one of the  
2 methods that's used by experts in terms of establishing damages  
3 is what we call the benchmarking or yardstick method. I'm now  
4 on slide ten of the slide packet.

5           The benchmarking in the yardstick method, contrary to  
6 the story that Willowood might put forward is a well-accepted  
7 theory under Federal Circuit Law. There are several decisions  
8 which the Federal Circuit has issued in which the Court has  
9 upheld damages that were determined using a benchmark method.  
10 We can give you the primary example, which is the damages  
11 theory in this case.

12           If Your Honor can turn to slide 24. In terms of  
13 Syngenta's damages in this case, our expert is Dr. Benjamin  
14 Wilner. He has a Ph.D. in managerial economics and decision  
15 science from the Kellogg Graduate School of Management at  
16 Northwestern. He has served not only as a damages expert in a  
17 number of cases, but also has served as a professor of  
18 economics, finance and statistics at a wide-range of business  
19 schools, not only at Northwestern, not only in the United  
20 States, but also abroad at Helsinki School of Economics.

21           The analysis that he has put forward in this case to  
22 calculate, to provide that reasonable probability of the  
23 damages and the harm that Syngenta has suffered, what he has  
24 done is, for each of the patents at issue -- we got the  
25 compound patents which is the '256 and the '076 Patent. Then

1 we've got the '138 Patent, which is a process patent. And the  
2 '761 Patent, which is the DABCO Patent.

3 THE COURT: The what?

4 MR. SANTHANAM: The DABCO Patent.

5 For each of those patents, and in the case of the  
6 compound group of patents, what he has done is, he has  
7 calculated the profits that Syngenta lost as a result of  
8 Willowood's early market entry into the azoxystrobin market.  
9 And he has taken into account Willowood's actions and also  
10 taken into account the actions of other potential market  
11 participants to create a but for scenario; that is, where would  
12 Syngenta have been but for Willowood's infringement.

13 Before we get into the specific analysis, what I  
14 would like to highlight for the Court is what he focused on.  
15 In terms of the actual products that he focused on, he calls  
16 them the AZ products-at-issue. Those are Syngenta's  
17 azoxystrobin products, but a subset. Now azoxystrobin can have  
18 crop protections which are uses for, you know, for crops after  
19 they are -- the seeds after they have been planted. But there  
20 are other uses for azoxystrobin as well. He has taken that out  
21 of the picture.

22 What he has focused on is just crop protection use of  
23 azoxystrobin, while excluding things such as seed care, lawn  
24 and garden products, et cetera. The reason for that is, he has  
25 taken an analysis of what Willowood's participation in the

1 market was, saw that Willowood's participation in these other  
2 areas, such as lawn and garden, seed care was some what  
3 limited, so to be conservative, he's excluded lawn and garden  
4 and seed care products from his analysis.

5           Then in order to calculate that but for scenario,  
6 Dr. Wilner has used what -- the benchmarking analysis or the  
7 benchmarking approach that the Federal Circuit has openly  
8 approved in several instances. What he has done is, he's used  
9 a combination of benchmarks, not only Syngenta's budgets, but  
10 also Syngenta's actual sales and other benchmarks from other  
11 products, and we'll go through that analysis.

12           If we go to slide 25, with respect to the compound  
13 patents, in order to calculate where Syngenta would have been  
14 but for Willowood's infringement, Dr. Wilner began with  
15 Syngenta's budgets for these azoxystrobin crop protection  
16 products. He looked at the gross profits that Syngenta had  
17 budgeted for each year and he compared them to the actual  
18 products that Syngenta -- what it made in each of those years  
19 and that was the starting point of his analysis.

20           What I would emphasize here is, that Syngenta's  
21 budgets are prepared through a very well-organized process.  
22 They are prepared --

23           THE COURT: I know we're going to get into all of  
24 this in more detail so, you know, looking for the overview  
25 here.



1           MR. SANTHANAM: Sure. He took the budgets that were  
2 prepared and used by industry experts in this area, and he  
3 figured out -- he calculated, well, how much of that, you know,  
4 the budgeted gross profits of Syngenta did they actually make.  
5 And then in order to compensate or adjust for other factors, he  
6 used other benchmarks to adjust his analysis.

7           The main benchmark for the compound patents that he  
8 used was what we call the intra-meso comparison. He took a  
9 related product, mesotrione, which is a herbicide. It is used  
10 on the same main crops; corn and soybeans. He compared  
11 Syngenta's budget for mesotrione with their actual experience  
12 at the same time.

13           The reason why he's making this comparison is, if you  
14 look at azoxystrobin, that was a market in which Willowood was  
15 participating. They entered the market early in 2013 and he  
16 compared it to an experience of mesotrione, where Willowood was  
17 not present.

18           The whole purpose of that was to adjust for  
19 extraneous factors like market factors, the potential of normal  
20 levels of generic competition, variations in Syngenta's budget,  
21 et cetera. The idea was -- and what he achieved was, that he  
22 factored out these extraneous factors.

23           I will jump to -- if we can go to slide 29. The  
24 ultimate -- the result of this analysis was, he created all  
25 output that would show you where Syngenta was while Willowood

1 was in the marketplace. What we have here on slide 29 is a  
2 chart with the red bars identifying the but for world that  
3 Dr. Wilner had calculated. That is what would have happened if  
4 Willowood would not have breached. The yellow bars or golden  
5 bars represent Syngenta's actual experience. And he used the  
6 mesotrione experience to factor out various extraneous efforts.

7 THE COURT: Okay. So I was hoping for about ten  
8 minutes, which you are still on compound patents and you have  
9 been talking for ten minutes.

10 MR. SANTHANAM: Yes, Your Honor. After this slide, I  
11 think for other patents we'll get through them relatively  
12 quickly.

13 THE COURT: All right. Go ahead.

14 MR. SANTHANAM: The idea was to show where Syngenta  
15 would have been but for the Willowood differential, which is  
16 represented by the red bars.

17 One thing I would note here is that, you know,  
18 Dr. Wilner calculated that Syngenta's profits would actually go  
19 down. And then he compared it to the actual experience and the  
20 difference between the red bars and the gold bars are the lost  
21 profits that Syngenta suffered.

22 If we go to the '138 Process Patent, what Dr. Wilner  
23 says is, well, the damages I calculated for the compound  
24 patents, that can serve as a conservative floor for the damages  
25 that Syngenta suffered as a result of the '138 Patent.

1           The reason is, that the damages are based on  
2 Willowood's head start. So for the compound patents they got  
3 approximately one year head start. For the '138 Patent, which  
4 expired in 2015, approximately 18 months later they got a-two  
5 year head start. So he said, well, if you just stick with the  
6 damages for the compound patents, that would be a conservative  
7 floor. He recognized that, maybe, that is overly conservative.

8           So he applied an analysis of another benchmark, two  
9 sets of benchmarks to identify what Syngenta's lost profits  
10 were. Again, he started with comparing their actual and  
11 budgeted azoxystrobin gross profits. For 2014 and 2015, while  
12 the '138 Patent was in force, he used the crop protection  
13 fungicides. This is the aggregate of all of Syngenta's crop  
14 protection fungicides to determine -- to basically adjust for  
15 his analysis.

16           Syngenta didn't make their budgets in some years.  
17 Syngenta made their budgets in other years. And in order to  
18 account for extraneous factors, he used the crop protection  
19 fungicides, that experience, to filter out those factors. But  
20 for 2017, that was a different scenario, because the compound  
21 patent had expired that year. So what he did was, instead of  
22 using the crop protection fungicides benchmark, he went to  
23 Syngenta's actual experience in 2014. That was the first year  
24 in which Syngenta lost effective exclusivity on its  
25 azoxystrobin products, due to Willowood's early market entry.

1 That served as an actual experience, an effective benchmark to  
2 calculate the lost profits as a result of Willowood's  
3 infringement in Syngenta.

4 For 2017 he used Syngenta's actual experience in 2015  
5 as a benchmark and that was because that was the second year  
6 after Syngenta lost effective exclusivity as a result of  
7 Willowood's early market entry.

8 If we go to the '761, which is the slide 24 -- 34,  
9 excuse me, in terms of the '761 DABCO Patent, Dr. Wilner says  
10 in order to calculate Syngenta's lost profits for that patent,  
11 he again opines that the damages for the compound patents is a  
12 floor and that, again, is because whereas for the compound  
13 patent Willowood got a one-year head start. For the DABCO  
14 patent if they are found to be infringing, that patent is still  
15 in force and so their head start is significantly longer. So  
16 he says that's a bottom line floor for the damages for the '761  
17 Patent.

18 In order to provide a more reasonable damages  
19 estimate, one that is not overly conservative, he applied the  
20 crop protection fungicides comparison for all years in order to  
21 filter out, again, those extraneous market factors that I'm  
22 sure Willowood will talk about.

23 So in sum, for the compound patents, Dr. Wilner used  
24 the intra-meso comparison as a benchmark. For the compound  
25 patent, the '138 Process Patent, Dr. Wilner used a combination

1 of benchmarks. He used the intra-crop protection benchmark as  
2 well as Syngenta's actual experience. And then for the '761  
3 Patent, he used the crop protection fungicides as a benchmark  
4 to calculate a damages position that was not overly  
5 conservative.

6 THE COURT: I want to be sure I understand that.  
7 When you say, "benchmark," he didn't, in the cases that I read,  
8 and we can talk about this later, it did not appear that  
9 experts were starting with budgets and adjusting them with  
10 benchmarks. They were just using this benchmark theory. That  
11 may not be right, but you can address that as we're talking a  
12 little bit later on, because I didn't actually see -- and I'm  
13 not saying this is required -- but I did not see a case where  
14 somebody had done exactly what Dr. Wilner is doing in this  
15 case, which is, take the budget and then adjust the budget  
16 using benchmarks, when in the cases that talked about  
17 benchmarks they did not appear to be doing that. They appeared  
18 to be doing other things with the benchmarks using the  
19 benchmark really as the measure, without consideration of  
20 budgets.

21 If I'm not right about that, or if that's an  
22 inadequate explanation -- if I'm right but that's not the whole  
23 story, I'm going to look for you to clear that up for me when  
24 we get to it.

25 MR. SANTHANAM: Yes, Your Honor.

1 THE COURT: All right. For Willowood, your overview.

2 MR. TILLER: Your Honor, two preliminary questions  
3 and one comment. One question before I start my overview. I  
4 want to apologize to everybody in the room if I cough a little  
5 bit. It's allergies.

6 THE COURT: Tis the season.

7 MR. TILLER: But I will gasp for breaths a couple  
8 times here.

9 Two, since this is our motion, do you want me to do  
10 my overview and then just start to roll into --

11 THE COURT: No. I would like an a view not so much  
12 about Dr. Wilner, because we're going to talk about Dr. Wilner.  
13 I know they've talked about him a bunch, but I'm more  
14 interested at this moment about how your client sees the  
15 damages. And, you know, I want you to just assume liability  
16 for purposes of this discussion.

17 I know Mr. Jarosz calculated a royalty. I assume  
18 that's your view about it, but if you can, tell me how -- I  
19 mean, I don't mind you addressing weaknesses in their theory --

20 MR. TILLER: And I'm really here prepared to address  
21 weaknesses in their theory, because Mr. Jarosz wrote a very  
22 lengthy report. To be candid, Your Honor, the vast majority of  
23 it was focused on the deficiencies and inaccuracies of  
24 Dr. Wilner's report, which I think is summarized in our  
25 pleadings.

1           With regard to what we believe damages can and should  
2 be, as you noted, Mr. Jarosz identified a reasonable royalty  
3 analysis, which is permitted under Section 284 of the Patent  
4 Act. In fact, it is expressly set forth in that section where  
5 it says that damages should be sufficient to adequately  
6 compensate the patent holder for the damages that they have  
7 incurred, but in no event less than a reasonable royalty. And  
8 because there is such a -- to be quite candid, deficiency of  
9 data to determine what are the more common theories, which I  
10 think Your Honor has already picked up on based on your  
11 comments a second ago, Mr. Jarosz did a reasonable royalty  
12 analysis.

13           So, for example, with the compound patents, there is  
14 no dispute that the compound -- that 5-kilograms of  
15 azoxystrobin technical was imported into the United States  
16 before the expiration of the compound patents. There is no  
17 dispute that that 5-kilograms was not sold. It had no effect  
18 on the marketplace. It occurred in 2013, and it was used  
19 purely to do formulation and EPA testing, phys chem test.

20           THE COURT: What kind of testing?

21           MR. TILLER: Physical testing. Because it was not  
22 sold.

23           THE COURT: In 2013?

24           MR. TILLER: Correct. We don't attribute any damages  
25 to that and at best, would apply a reasonable royalty. The

1 total sale price, if that azoxystrobin were to be sold. It  
2 wasn't. It was provided to do the testing, but if it were to  
3 be sold, it would have a market value of roughly of 2,000,  
4 \$2,500. So to the extent that a reasonable royalty could be  
5 applied to that, so be it. We're talking about hundreds or  
6 maybe even a thousand dollars.

7           With regard to the method patents, remembering that  
8 the damages must be for infringement, not necessarily for the  
9 product that results from the infringement. Here, for the  
10 method patents, the infringement -- the methods are methods of  
11 manufacturing. The parties certainly do debate as to whether  
12 there are other manufacturing methods. Those methods represent  
13 incremental improvements to the method of manufacturing.

14           Let me take them in -- I guess what I'll call reverse  
15 order. I'll take the DABCO Patent first. The DABCO Patent is  
16 the one that is still in effect. The DABCO Patent, method of  
17 manufacture that is claimed in that patent is an improvement to  
18 the method that's claimed in the '138 Patent. As Your Honor is  
19 aware, the '138 Patent covers two steps etherification and  
20 condensation.

21           The DABCO Patent, the '761 Patent covers using DABCO  
22 to catalyze the condensation reaction. There is evidence that  
23 by using the DABCO Patent efficiencies -- or that the  
24 production is made more efficient by somewhere between ten to  
25 20-percent. So Mr. Jarosz used that 10 to 20-percent number,



1 calculated a reasonable royalty off of that and came up with  
2 damages roughly in the range of two to \$2.5 million. So that  
3 is what we believe is the -- and by the way, that 2.5, you  
4 know, assuming that we've been doing this the whole time, which  
5 is the allegation, that 2.5 would also cover the '138. That  
6 \$2.5 million would also cover the '138 Patent, because it is  
7 the actions. It is the same allegedly infringing conduct. It  
8 is the same sales. It is the same production going to both,  
9 and obviously --

10 THE COURT: But the '138 Patent is not an improvement  
11 patent. Your improvement argument, how does it work with the  
12 '138 Patent?

13 MR. TILLER: We argue there are other commercially  
14 viable alternatives and that it actually does represent an  
15 improvement. For example, there is another company to which  
16 Syngenta sent a cease and desist letter that says you infringe  
17 the '138 Patent and the other company came back and said, no,  
18 we don't, here is what we do. So, again, he bases his  
19 reasonable royalty analysis for the '138 Patent based on  
20 testimony from Dr. Wilner himself talking about the  
21 improvements, the efficiency improvements that the '138 Patent  
22 brought to bear on some of the known earlier methods.

23 Again, remembering that in 2014 -- that the '138  
24 Patent expired in December of 2015, and at that point  
25 importation was -- I'm not saying it didn't happen, it did, but

1 it was ramped up at that point, to be quite honest. So there  
2 was just less stuff that was brought into the United States and  
3 thus less infringing activity from July of 2014 to December of  
4 2015.

5 So we believe and Mr. Jarosz will testify that  
6 damages are more in the range of somewhere around \$2.5 million  
7 based on a reasonable royalty analysis.

8 Your Honor, I can stop here.

9 THE COURT: That's good. That's very helpful. Thank  
10 you. Okay.

11 So we'll start with the motion to exclude Dr. Wilner.  
12 Let me just tell you my general -- I won't call it my first  
13 impression. I think I'll call it my third impression, but you  
14 all are here to help me form a fourth impression. I didn't  
15 have a lot of trouble with his testimony on the compound  
16 patents or the '138 Patent. I'm not trying to prevent anybody  
17 from talking about that. You know, the defendant may want to  
18 talk about that more specifically. I didn't have a lot of  
19 trouble about that because here we are. It just seemed pretty  
20 straightforward to me, but when I got to the '761 Patent, I had  
21 a good bit of trouble with Dr. Wilner's testimony, because he  
22 did not -- he just assumed -- he made the same assumption about  
23 the first, as I recall, I don't have it right in front of me,  
24 but I think it was the first three *Panduit* factors for the '761  
25 as he did for the other, which means he assumed the absence of

1 acceptable non-infringing substitutes, but by the time you get  
2 to the '761 Patent after 2015, the '138 Patent has expired.

3 I do not understand Syngenta's argument that there is  
4 no non-infringing alternative after that point. That seems to  
5 not make sense to me. Well, it doesn't make any sense to me.  
6 So perhaps it makes sense -- so Syngenta may want to address  
7 that point. But Dr. Wilner just glossed over that and that  
8 seems to me to be a pretty big problem for Syngenta.

9 So there we are. The whole non-infringing  
10 alternatives, you know, kind of bleeds over into Syngenta's  
11 motion a bit, but I don't understand how Syngenta can say after  
12 the '138 Patent expired there were no non-infringing  
13 alternatives, you know, whether somebody was making it or not.  
14 I just have trouble with that.

15 I'll let everybody address those issues. But it did  
16 seem -- I also have trouble from Willowood's point of view with  
17 the argument with understanding how Willowood can say, oh, it's  
18 just a royalty question, when clearly Willowood got advanced --  
19 I say clearly. Clearly Syngenta has evidence that Willowood  
20 got early entry because of its infringement. And so -- you  
21 know, you all can address that, too.

22 As I indicated -- I think my case manager mentioned  
23 to you all before, I did want you to help me with the cases  
24 because, you know, Dr. Wilner's evaluation seems -- certainly  
25 the cases make it clear that you do not have to do it any

1 particular way, as long as it meets Rule 702 in terms of lost  
2 profits, price erosion. Syngenta has done it a slightly  
3 different way here that sort of takes into account both of  
4 those things without separately calculating them, I think, if I  
5 understand correctly. But as I have said to you all before, I  
6 am not a patent lawyer and will appreciate your help on that.

7 Let me hear from Willowood on their motion to exclude  
8 Dr. Wilner's testimony.

9 MR. TILLER: Thank you, Your Honor. You mentioned  
10 something just a second ago that I wanted to focus on, which  
11 was that Syngenta has -- or Dr. Wilner has at least,  
12 apparently, I think that may have been your words, apparently  
13 taken into consideration both price erosion and lost sales. We  
14 don't know that. That's the point. We don't know that.

15 So let me step back to the compound patents briefly,  
16 Your Honor. As Syngenta's counsel set forth what Dr. Wilner  
17 did was, he started with the Syngenta budgets and then modified  
18 the analysis or used the mesotrione as a benchmark to allegedly  
19 take into account other factors.

20 So let's start with the budgets. The simple fact of  
21 the matter, Your Honor, is, Syngenta is not very good at  
22 budgeting. Your Honor, these were attachments. These were  
23 exhibits to our motion, but you'll see that -- and this is all  
24 the data we have. This is all the data that was provided to  
25 us, despite the fact that azoxystrobin was on sale at the

1 beginning of 1998.

2 In 2009, Syngenta overestimated sales by roughly  
3 39-percent. 2010, again, similarly off. 2011, similarly off,  
4 although admittedly, this time they underestimated sales.  
5 2012, like we said in our paper, not bad, not great, but not  
6 bad. 2013, again, off. 2014, again. This is the universe of  
7 data.

8 The Federal Circuit has said if the data is  
9 unreliable, then the opinion is unreliable and they said that  
10 in -- and I read a lot of cases over the weekend, Your Honor.  
11 *Power Integrations versus Fairchild*. They said that the source  
12 and the reliability of the data is material. You can't rely on  
13 bad data. Everything that we know, and that is the universe of  
14 what we do know right now. Again, maybe from 1998 to 2008 they  
15 were much, much better at it and these are anomalies, but we  
16 don't know that. When the data is bad, the opinion is  
17 unreliable. And it is not as if they were just off with  
18 azoxystrobin. Again, these were all exhibits that were  
19 attached to our pleadings.

20 If you look at the analysis, their budgets for each  
21 azoxystrobin product, they have what they call -- Syngenta has  
22 a brand ladder; more expensive products, less expensive  
23 products. And as you can see, the budgets are wildly, wildly  
24 off. It is not --

25 THE COURT: Maybe Syngenta can answer this when they

1 get to it, but do you have the budget for -- I'm going to call  
2 them meso products? Do you have their budgets for --

3 MR. TILLER: There is the mesotrione budgets.

4 THE COURT: What I understand Dr. Wilner did is, he  
5 took the budgets and then he adjusted them using what happened  
6 with the meso actual sales. One of my questions is: Did they  
7 track from 2009 to 2013 before you started seeing arguably  
8 effects on --

9 MR. TILLER: Before we started importing.

10 THE COURT: Yes. Do you understand my question?

11 MR. TILLER: I'm not sure I do.

12 THE COURT: Well, he's adjusting the azoxystrobin  
13 budgets based on what happened with the meso sales.

14 MR. TILLER: Correct.

15 THE COURT: Well, if that would have tracked for  
16 2009, then that's reasonable.

17 MR. TILLER: I think I do understand what you are  
18 saying.

19 THE COURT: I'm not a numbers person, either.

20 MR. TILLER: This is going to be a theme not just for  
21 the meso budgets but for the crop protection fungicide analysis  
22 that he did for '138 and '761.

23 I think what you are saying is, hey, if azoxystrobin  
24 sales versus budgets sort of tracked in the same way that  
25 mesotrione sales versus budgets year over year, they are

1 consistently --

2 THE COURT: Up or down, whatever. Roughly the same  
3 percentages.

4 MR. TILLER: Up or down and roughly the same  
5 percentages. The short answer is, we have no idea. The short  
6 answer is -- and you have had a chance to read Dr. Wilner's  
7 opinion. Nowhere, nowhere does he do that.

8 THE COURT: I knew he didn't do it, or I didn't see  
9 it.

10 MR. TILLER: He did not do it and we're not aware,  
11 and we certainly don't have -- you know, that data has not been  
12 calculated and, again, I think -- so we start with the  
13 fundamental premise that Syngenta is not good at budgeting.

14 Again, *Power Integrations versus Fairchild*, if the  
15 data is unreliable, the opinion is unreliable. We cited to a  
16 number of cases. The *Sunlight* case. Other cases where  
17 budgets -- the *Celebrity Cruise* case out of the Southern  
18 District of New York.

19 I know you wanted us to focus on the Federal Circuit,  
20 but a lot of those cases analyzed the propriety of using  
21 budgets as a benchmark. I can't claim to say universally, but  
22 many of those cases have not. Obviously all the cases we cited  
23 point to the fact that you can't just rely on the budgets,  
24 particularly if there is a history of those budgets being  
25 wrong.

1 THE COURT: Well, of course he didn't.

2 MR. TILLER: He didn't. That is absolutely true.  
3 Well, let's stick with the compound patents first. With the  
4 compound patents, he does. What he does is, he says mesotrione  
5 in any particular year our budget said X. In 2014 we estimated  
6 this. In 2014 our actual sales was this. The difference was  
7 -- let's just make up a number. The difference was 10-percent.  
8 I'm going to go back to the azoxystrobin budgets and say, well,  
9 using mesotrione as a benchmark, Syngenta sales would have been  
10 90-percent of their budgeted sales and because they were  
11 70-percent, I'm giving that as the difference.

12 So for the compound patents he's using budgets on  
13 both as his starting point and as his benchmark adjustment.  
14 There is two problems with that, Your Honor, in addition to the  
15 fact that the budgets are just -- there is a history of  
16 inaccuracy.

17 THE COURT: For the meso, though, he's using the  
18 difference between the budget and actual sales.

19 MR. TILLER: Correct.

20 THE COURT: Okay.

21 MR. TILLER: Then he is saying whatever that  
22 percentage is, I'm going to apply it over here to azoxystrobin.  
23 So we start with the budgets are back. And this is a problem,  
24 because we don't know how the budgets are done. And to be  
25 perfectly candid, Your Honor, neither does Dr. Wilner.



1           You focused earlier on page 30 of his report. His  
2 analysis of using budgets as a benchmark and mesotrione as a  
3 benchmark is all encompassed on pages 29 to 30 of his report.

4           He testified -- my partner specifically asked him, is  
5 there anything else that is important, anything else that you  
6 relied on? He said, no, it's all right there. So while in  
7 talking about using budgets as a benchmark while he talks about  
8 this is an exacting process and the product leads and sales  
9 managers taking copious amounts of data and review that data  
10 and then are constantly analyzing that data to figure out the  
11 budgets. We don't know what that data is, and I think -- we  
12 have no clue what -- I'm going to give you a couple of  
13 examples. I'm going to show you quickly on the screen. They  
14 are just kind of random examples, but for example --

15           THE COURT: So if I can back away a bit from what you  
16 are saying. Nobody has been identified by Syngenta as a  
17 witness who is going to come in and testify about the budget  
18 process?

19           MR. TILLER: I will tell you this, Your Honor, I  
20 don't know. I mean, nobody has been specifically identified as  
21 a budgeting person. But the fact of the matter is, I think --  
22 you know, we're -- he is supposed to -- he concedes, and the  
23 law is very clear, that he has the obligation to make sure that  
24 the data is reliable, to make sure that the data makes sense.  
25 Very conspicuous in his report, and it is on page 30, I think

1 it's on page 30, he says, "given the exacting process employed  
2 to create the budgets, Syngenta believes that the budgets  
3 provide the best estimate about what the gross sales, net  
4 sales, cost of goods sold and gross profits will be for each  
5 Syngenta product." He doesn't say, I have confirmed or I have  
6 run the numbers or anything like that. He says, I'm just going  
7 to take them at their word. What we don't know, we don't know  
8 anything, quite frankly about the budgeting process. So for  
9 example, I'm sure you heard, you know, there is the concept --

10 THE COURT: Well, see, that's why I am asking you,  
11 because experts -- it depends. Mr. Jarosz doesn't know  
12 anything, for example, about whether there are non-infringing  
13 alternatives.

14 MR. TILLER: That is true.

15 THE COURT: He cannot possibly know that and yet, if  
16 you have other evidence of non-infringing alternatives that is  
17 in front of -- this is what I understand the law to be. I'm  
18 asking you to correct me if I'm wrong. If you have other  
19 evidence of non-infringing alternatives, then his opinion,  
20 based on the existence of those non-infringing alternatives,  
21 may well be admissible.

22 MR. TILLER: Yes.

23 THE COURT: If, however, you do not have any such  
24 evidence, then his opinion is not going to be admissible.

25 MR. TILLER: Fair point, Your Honor.

1           THE COURT: As to Dr. Wilner -- that's why I asked  
2 you about their other witnesses because if they had other  
3 evidence about these budgets, I don't know that they do or not,  
4 then maybe he could base his opinion, you know, in the -- I'm  
5 old. What we used to call hypothetical questions.

6           MR. TILLER: Understood.

7           THE COURT: You know, so that's why I asked you that  
8 question.

9           MR. TILLER: Here is the difference, Your Honor. In  
10 his report, Mr. Jarosz said here is the evidence I'm relying  
11 on. Dr. Wilner hasn't told us. Again, it is all on pages 29  
12 and 30. He doesn't tell us anything other than it is an  
13 exacting budgeting process, they look at everything. We don't  
14 know what they had. We don't know how they analyzed it. We  
15 don't know how it changes.

16           There is also something interesting in the report  
17 that he says over and over again. They have consistency in the  
18 budgeting process, you know, they use -- the budgeting process  
19 is the same. That's a really interesting fact, because he also  
20 concedes that every product is different, every product faces  
21 different market conditions.

22           In fact to quote him he says, "Each product faces  
23 different marketing conditions as exclusivity could change, new  
24 Syngenta products could be introduced, competition could  
25 change. The crops on which the product is used have different

1 economics. The geographies in which the products are primarily  
2 sold --

3 THE COURT: When you read, you need to slow down or  
4 the court reporter --

5 MR. TILLER: Do you need me to say that again?

6 THE COURT: No. She followed you.

7 MR. TILLER: He finishes the sentence with, et  
8 cetera. It's an interesting use of the word, "et cetera." I'm  
9 not sure what that et cetera is supposed to analyze there,  
10 particularly when it is his obligation to tell us what he has  
11 done.

12 So, for example, these are just some different  
13 documents from Syngenta. These first two talk about  
14 essentially price elasticity. I'm sure you're well-aware of  
15 that one, Your Honor, as prices go down, sales tend to go up  
16 and vice versa. So this data that Syngenta has says a  
17 20-percent reduction in price would increase volume by  
18 84-percent and increase revenue by 46-percent. Did they take  
19 that into account? How did they take that into account? What  
20 did they do with that data? We don't know.

21 THE COURT: I guess I don't really -- what's wrong  
22 with this approach? You know, they -- yes, the budgets are not  
23 always accurate, but that's the point of the benchmarks is, to  
24 correct the budgets to show inline with actual experience of a  
25 some what similar product. You know, when you look at the

1 cases that talk about damages other than reasonable royalty,  
2 you don't have to show for sure, because what you are talking  
3 about is a hypothetical universe where infringement did not  
4 happen, so you have to make some assumptions. You have to make  
5 some adjustments. You have to make -- I don't want to use the  
6 word guesses exactly, but you have to say, okay, well, what  
7 would have happened. You cannot say, well, this absolutely  
8 would have happened, because nobody can do that. That's  
9 impossible. So what they have to do is come up with a  
10 reasonable probability, and why is this not a reasonable  
11 probability? Let's just stick with the compound patents and  
12 the '138.

13 MR. TILLER: Let me get to that, Your Honor. I  
14 agree. There has to be some level of speculation to determine  
15 this but for world, but the courts have said and the Federal  
16 Circuit in particular is getting pretty strict on this point,  
17 that if you're going to use comparisons -- and while I think  
18 Your Honor sort of put aside the reasonable royalty cases, I  
19 think those cases are very interesting. I'll get to that in a  
20 minute. But you have to -- it is your burden as the expert  
21 to -- it is your burden as the proponent of that testimony to  
22 show why that but for world is reasonable. I don't think there  
23 would be a debate about that.

24 And so looking -- let's stick with the budgets for  
25 half a second, then I'll move onto the mesotrione.

1           There is all this data. He says that, you know,  
2 whether competition could change, whether Syngenta offers new  
3 products can be taken into account. Here, they say "Syngenta  
4 will launch three new fungicide active ingredients over the  
5 next --

6           THE COURT: Slow down. I'm sorry, I couldn't follow  
7 you.

8           MR. TILLER: "Syngenta will launch three new  
9 fungicide active ingredients over the next four years." Did  
10 they take that into account in their budgeting?

11           There is an interesting one here, Your Honor, where  
12 they say "generics gained minimum volumes in 2015." So  
13 remember now we're already a year into our alleged  
14 infringement. "Generics gained minimum volumes in 2015. A  
15 generic volume represents about 2-percent of the total market."

16           THE COURT: Well, that's because you lowered the  
17 price and they had to match the price and, therefore -- I mean,  
18 at least arguably, I'm sure that's what they are going to say.  
19 They are nodding yes.

20           MR. TILLER: Of course that's what they are going to  
21 say, but the question is, how do they take into account in  
22 their budgeting? We don't know. We don't know, they don't  
23 know. They haven't told us.

24           Part of the reason we have expert reports is so that  
25 we're not getting blindsided at the trial. You know, another

1 example which is very interesting right here, they say in 2016  
2 that there is a risk that commodity prices could deteriorate  
3 reducing farm economics further and that that could have a 10  
4 million-dollar effect on sales in 2016. Did they take that  
5 into account? We don't know. If they did, how did they take  
6 that into account? We don't know. And unquestionably,  
7 Dr. Wilner doesn't know.

8           Now let me go to mesotrione, because I think Your  
9 Honor is making the point that Syngenta will make. Did they  
10 have to come up with -- there has to be a way to do this, but  
11 the courts have said over and over and over again, that because  
12 it is hard, because there might be -- it might not be easy, you  
13 still have to prove that the but for world is reasonable in  
14 light of the world that you are in.

15           So the courts have over and over again said you can't  
16 use that as a benchmark. You can't use this as a benchmark, so  
17 let's --

18           THE COURT: But they also said several times you can  
19 use things as benchmarks and meso does have some similarities  
20 to the azoxystrobin.

21           MR. TILLER: I'm not sure it does.

22           THE COURT: Isn't that a question for  
23 cross-examination?

24           MR. TILLER: No, Your Honor, it's not. For example,  
25 let's look at the *Crystal Semiconductor* case, Federal Circuit.

1 This involved technology, which seems so old these days despite  
2 the fact that it was less than 20 years ago, technology to  
3 convert analogue converters, to take an analogue signal and  
4 make it a digital signal. What the expert tried to do was use  
5 the PC market -- or to use the Apple market as a benchmark for  
6 the PC market. Both computers. Both have huge sales. Both  
7 use very similar -- both face similar market conditions. The  
8 Federal Circuit said, no, you cannot use that as a benchmark.  
9 You cannot use that as a benchmark because you have not  
10 shown -- it is your burden to prove -- you have not shown that  
11 there is enough similarities in the market conditions to  
12 justify use of the -- to justify use of that as a benchmark.

13 I defy Syngenta to tell us this. There is nothing in  
14 Dr. Wilner's analysis that talks about how the market  
15 conditions facing mesotrione are similar to the market  
16 conditions facing azoxystrobin.

17 Here is what they say are the similarities: They're  
18 both big sellers. Okay. They are both big sellers. They both  
19 came off -- we lost exclusivity; one through patent expiration  
20 and one through FDA data compensation exclusivity at about the  
21 same time. And they both are sold as mixtures. But there is  
22 nothing to tell us as to why the markets are similar. It would  
23 be easy for them to do that, Your Honor, because both of these  
24 compounds have been on sale for a long period of time, and as  
25 you I think correctly pointed out a second ago, it could have



1 been pretty easy to show that they track each other, but  
2 Dr. Wilner didn't do that. Here is what we know. We know  
3 mesotrione fights weeds, fights the proliferation of weeds. We  
4 know that azoxystrobin fights certain fungal diseases. We've  
5 given you the labels for both. There is literally nothing that  
6 is similar.

7           They say, well, they're both used on the same crops,  
8 or they are both used on some, I emphasize some, some of the  
9 same crops, but that's like saying, you know, gasoline and  
10 windshield wiper fluid are subject to the same market  
11 conditions because they are both used on cars. Shampoo and  
12 hair dye faces the same market conditions because they are both  
13 used in hair. It is as preposterous as saying aspirin and  
14 chemo drugs, well, they are both used on the human body so  
15 thereafter they face the same market conditions. You can't  
16 make conclusory statements like that, and the federal circuit  
17 has been saying over and over again you can't just make  
18 conclusory statements.

19           THE COURT: Which cases are you talking about where  
20 they say that over and over again?

21           MR. TILLER: I will concede that they are in a lot of  
22 reasonable royalty cases but, again, reasonable royalties, they  
23 use benchmarks in reasonable royalties.

24           THE COURT: Right.

25           MR. TILLER: They use other licenses. For example,

1 in *Birnetx*, 767 F 3d. 1308, 2014 case. "We have held in  
2 attempting to establish a reasonable royalty --

3 THE COURT: When you read, read slowly.

4 MR. TILLER: "We have held that in attempting to  
5 establish a reasonable royalty, the licenses relied on by the  
6 patentee in proving damages must be sufficiently comparable to  
7 the hypothetical license at issue. When relying on licenses to  
8 prove a reasonable royalty alleging a loose or vague  
9 comparability between different technology or different  
10 licenses does not suffice." And that Court was quoting the  
11 *Laser Dynamics* Federal Circuit decision.

12 This court, the *Birnetx* court goes on to say that  
13 "the expert must account for differences in the technologies  
14 and economic circumstances of the products." That was not done  
15 by Dr. Wilner here.

16 In the *Whitser versus Computer Packages* case, 694 F.  
17 3d. 10, Federal Circuit 2012, in talking about the analysis of  
18 the *Georgia Pacific* factors and, Your Honor, I think you know  
19 that *Georgia Pacific* are certain factors that an expert may or  
20 may not examine in determining a reasonable royalty. The Court  
21 said, listen, the expert doesn't have to analyze every single  
22 factor, but when you do look at a factor, you cannot just -- or  
23 the expert cannot just make a conclusory remark about its  
24 impact on the damages calculation. It requires some basis for  
25 comparison so that the jury can make that analysis.

1           Another case is the *Lucent versus Gateway* case. In  
2 that case, again, concededly, a reasonable royalty case, but in  
3 looking at the licenses that were being used, the court said,  
4 many of the -- "some of the licenses are radically different  
5 from a hypothetical agreement under consideration for this  
6 particular patent." And they also criticized the expert  
7 saying, "we are simply unable to ascertain from the evidence  
8 presented the subject matter of the agreements and the market  
9 conditions applicable to those agreements." The court went on  
10 to say the party's expert never explained to the jury whether  
11 the patented technology is essential, what market conditions  
12 were in effect, and so --

13           THE COURT: You've been talking for 30 minutes so I  
14 do need you to move on at some point to the '761 Patent because  
15 I am hoping we'll get done before lunch.

16           MR. TILLER: Yes. As I am. '138 and '761 both --  
17 let me talk about what they have in common in the analysis.  
18 The analysis is -- Dr. Wilner says here are the actual sales  
19 for azoxystrobin in each year, and I'm going to increase them  
20 or decrease them by sales of crop protection fungicides. So  
21 the first thing he does is, he says, well, had they had -- had  
22 there not been an infringement, their sales would have actually  
23 started up higher, and then I'm going to move them based on  
24 crop protection fungicide. This is the same problem, Your  
25 Honor.

1           First of all, theoretically, there should be a lot of  
2 data that says azoxystrobin sales tend to move up and down in a  
3 similar way to the crop protection fungicide sales. Dr. Wilner  
4 does not do that analysis. And then there is the same problem  
5 that we saw with mesotrione, but here it is amplified by ten,  
6 and the reason for that is, Dr. Wilner just says, well, crop  
7 protection fungicide sales, azoxystrobin is a fungicide, of  
8 course their sales are going to move up and down together. He  
9 does not identify one iota of evidence to establish the  
10 similarity of the market condition of the products. They are  
11 in this group of crop protection fungicides. I think there is  
12 19 different ingredients that fall into that designation. They  
13 are obviously -- they are different active ingredients. They  
14 do different things, presumably based on Dr. Wilner's own  
15 statement that the market conditions facing each product are  
16 different. He just assumes, without -- he doesn't even attempt  
17 to make some facial remark that the market conditions are  
18 similar. He just blows by it. I presume the assumption is,  
19 well, crop protection fungicides are fungicides, azoxystrobin  
20 is a fungicide, of course the market conditions facing each one  
21 are the same.

22           As we saw in the *Crystal Semiconductor* case out of  
23 the Federal Circuit, as we saw in *Eleven Line* case out of the  
24 Sixth Circuit, you can't just say, well, two things are the  
25 same, therefore, you can use them as a benchmark.

1           So for example, in Eleven Line, which I think is a  
2 spot-on case, the expert was using -- the plaintiff's owned a  
3 facility, and claimed that certain things had happened.

4           THE COURT: Keep your voice up.

5           MR. TILLER: In Eleven Line, the expert said, I'm  
6 evaluating the but for world for this facility located in a  
7 particular city and I'm going to use as a benchmark the  
8 plaintiff's own facilities in other locations, all owned by the  
9 plaintiff, all running under the same name brand, all doing the  
10 same business. The Court said, no, that's not good enough  
11 because you are just assuming that they are all the same. You  
12 haven't analyzed. They are in different cities. What are the  
13 market conditions facing those cities? Maybe in some of those  
14 cities the service that is offered is more needed, less needed.  
15 Maybe in some of the cities the facilities are kept cleaner,  
16 the employees are nicer, whatever it may be. There was no  
17 analysis of the market conditions and the court said just  
18 because you say it, doesn't make it so.

19           There is not one sentence in Dr. Wilner's report  
20 justifying his use of crop protection fungicide as a benchmark.

21           Now I want to point to something Mr. Santhanam said  
22 during his initial overview, which is, the case law has shown  
23 benchmarks are used all the time. But I think, Your Honor, you  
24 very correctly pointed out that there doesn't seem to be a case  
25 where benchmarks are used in this way. I think you're exactly

1 right. There isn't a case where benchmarks are used in exactly  
2 this way.

3           The case that Syngenta really focuses hard on is the  
4 *Erickson* case. There is a lot of discussion about the *Erickson*  
5 case. The *Erickson* case is a price erosion case. That's not  
6 what Dr. Wilner did here. In *Erickson* there was -- and I'll  
7 quote the court, "substantial evidence" of the similarities of  
8 the market between the benchmark product and the product which  
9 was being infringed upon. Substantial evidence. The Court  
10 went on to say -- because what was going on was, the expert was  
11 trying to show what the price should have been but for the  
12 infringement. The Court said, despite the fact that the  
13 product, the benchmark product was obsolete, some new  
14 technology had come in to make one aspect of the product  
15 better. The expert did a significant analysis to show that  
16 that factor, that improvement to the technology did not effect  
17 the price. So, therefore, because the price -- here is what  
18 the price would have been, the differences in the two  
19 technologies wouldn't have effected that price. The Court  
20 said, okay, we can let you use that as a benchmark to establish  
21 what the price should have been in this case. That's a far cry  
22 from what is going on here.

23           Here, particularly when you talk about -- at least  
24 with mesotrione he tried to do some comparison of the product.  
25 He didn't do a comparison of the market, not a lick, but he at

1 least tried to compare the products.

2           When he uses crop protection fungicides as a  
3 benchmark, Your Honor, he doesn't even attempt -- he does no  
4 attempts to compare the markets. He does no attempt to compare  
5 the products and, presumably, this is data that would -- that  
6 should be out there and it hasn't been provided and he  
7 certainly hasn't analyzed it.

8           So in effect what he has become, he's just become the  
9 mouthpiece for Syngenta. They think these sales go up and down  
10 together. He thinks they go up and down together. They think  
11 mesotrione sales go up and down with azoxystrobin, they think  
12 it, he thinks it. They think their budgets are right, he  
13 thinks their budgets are right. That's what we have going on  
14 here and that is not permitted.

15           THE COURT: I mean, he doesn't think their budgets  
16 are right, because obviously they aren't. That's the whole  
17 point of what follows after the budgets is to correct -- as I  
18 understand it, he takes the budget as the starting point, but  
19 he knows that they don't reflect reality, so you have to adjust  
20 them for what actually happens, which is what I think as I  
21 understand it he's trying to do. So, I mean, it's not really  
22 enough to say, well, the budgets are inaccurate. All budgets  
23 are inaccurate that's why you adjust them for reality.

24           MR. TILLER: He starts with the premise -- when he  
25 does his analysis he starts with the premise that but for the

1 infringement the budgets were accurate. That's what he starts  
2 with. He says the budget -- they would have, but for the  
3 infringement, the budgets -- they would have met the budgets or  
4 at least been closer to the budgets. What he uses mesotrione  
5 for, remember, is to account for what other market conditions  
6 may have been in play, or why he believes mesotrione is  
7 indicative of those market conditions when it is a completely  
8 different product in a completely different area of  
9 agricultural chemicals. We don't know, but he says whatever  
10 that difference is in mesotrione budgets for sales --

11 THE COURT: I understand --

12 MR. TILLER: -- the same thing would have happened.  
13 But he starts with the fundamental premise that the budgets are  
14 the place to start. And when they are inaccurate, when they  
15 are wildly historically woefully inadequate, you can't start  
16 with that fundamental premise that they are right, or at least  
17 close to right, because that's what he is starting with. He's  
18 starting with the premise of, they are pretty close, then he  
19 adjusts them --

20 THE COURT: I'm going to give you five minutes to  
21 finish up.

22 MR. TILLER: Your Honor, I'm done, other than the one  
23 sort of extraneous point of our motion, which is, the testimony  
24 about the formulator's exemption. As you know, Your Honor  
25 dismissed that count. That count would have led to --



1           THE COURT: So there is two parts of that. One is  
2 the evidence that you went to the EPA and you got this  
3 approval, which allowed you to enter the market early. Are you  
4 saying that that's inadmissible, as opposed to the evidence  
5 that you -- I'll just call it the 404(b), the bad conduct  
6 aspect of that evidence. There is two parts of it.

7           It seems to me that Syngenta is allowed to come in  
8 and say they went in -- they used our stuff, they got this  
9 formulator's exemption and that allowed them early entry and  
10 that is why we started getting damages sooner rather than  
11 later. There is that. I have trouble understanding why that's  
12 not admissible.

13           The second part is a little different. If they want  
14 to, you know, call you a bad actor for misrepresentations that  
15 were made in those applications and such, I'm going to let them  
16 tell me why that's relevant.

17           Do you see what I'm saying?

18           MR. TILLER: I do. I think in that first -- so first  
19 of all, I agree with you on that second part, that's not  
20 relevant. On that first stuff, I think there is actually two  
21 things in there. One, the fact that we applied for EPA  
22 registration in 2013, the fact that we were approved in 2014,  
23 all before their patents expired, and the fact that we used the  
24 results of testing done in the United States that may have been  
25 in violation of the patents, that all comes in, of course.

1           The fact that we used their data, the fact that we  
2 made a statement to the EPA that we were going to use them as  
3 our supplier, that shouldn't come in, because the only reason  
4 that comes in is to show that we somehow violated the  
5 formulator's exemption or the 404(b), for bad conduct.

6           THE COURT: Doesn't it show infringement?

7           MR. TILLER: No. That has nothing to do with  
8 infringement. Infringement is the importation of the  
9 azoxystrobin into the United States. That they can offer  
10 evidence of, absolutely. We can't get around that fact. The  
11 fact that the results of the testing was submitted to the EPA,  
12 that can come in, too. No dispute about that. It is our  
13 allegedly improper statements to the EPA about the source of  
14 our azoxystrobin, about the data that we're relying on for our  
15 azoxystrobin, that was the basis of the forward 404 claim which  
16 has now been dismissed.

17           The problem comes if you -- if the Court allows that  
18 to come in, then we have to start putting on evidence about why  
19 there was nothing wrong with what we did. They're bringing it  
20 in to show we did something wrong, let's face it. That's the  
21 purpose behind it. And then we have to come in and say, well,  
22 no there is reasons we did it, we're allowed to do it. The EPA  
23 has said we can do it. Whatever is the countervailing evidence  
24 and all of a sudden we're having a trial about the 404 issues,  
25 and I will tell you, that trial of the 404 issues, will --

1 THE COURT: When you say 404, you're talking about  
2 the --

3 MR. TILLER: Formulator's exemption, statements to  
4 the EPA.

5 THE COURT: Are you talking about the copyright  
6 claim?

7 MR. TILLER: No. Unfair and deceptive trade  
8 practices.

9 THE COURT: All right. Sorry. I hear 404 and I'm  
10 like, evidence rule. You're talking about unfair and deceptive  
11 trade practices.

12 MR. TILLER: I'm talking to unfair and deceptive  
13 trade practices and the basis of that is, you violated the  
14 formulator's exemption. I just want -- you know, the  
15 statements that we did something wrong as a result of those,  
16 the allegations that we did something wrong, those have all  
17 been thrown out and should be excluded.

18 Thank you, Your Honor.

19 THE COURT: I'm going to let you get started and  
20 we'll take a break wherever you get to a reasonable stopping  
21 point.

22 MR. SANTHANAM: Your Honor, I'm going to start on  
23 slide nine of the slide deck that we have prepared. Just  
24 briefly to touch upon this argument about reasonable royalties  
25 that counsel for Willowood raised. What they came in and told

1 the Court was, our expert has calculated a reasonable royalty,  
2 that's a better estimate of damages, therefore, the Court  
3 should go with it. And, quite frankly, that's not the law.

4           The case that we would direct the Court to in that  
5 respect is the *Delmar Avionics* case, 836 F 2d. 1320. In that  
6 case, the defendant made the exact same argument. They said,  
7 well, trying to figure out lost profits is going to be too  
8 complicated, the Court should just adopt this reasonable  
9 royalty analysis that our expert has calculated, and the Court  
10 adopted it. The district court said, okay, I'm going to adopt  
11 a reasonable royalty analysis.

12           What Federal Circuit said was, no, it's not -- in  
13 order to prove damages you don't have to prove it with  
14 precision, and what the Court needs to do is, measure -- you  
15 know, the Court is required to approximate the lost profits, so  
16 we can't just adopt a reasonable royalty as just an  
17 alternative. The lost profits analysis has to be addressed.

18           Now if we can turn to the discussion of the budgeting  
19 and benchmarking analyses. One thing -- I want to go back and  
20 start with a brief overview of how the damages analysis has  
21 been -- there has been a lot of talk about how Syngenta  
22 struggled with the budgets, and that's not entirely accurate.  
23 The way that Dr. Wilner calculated his damages analysis was, he  
24 started, number one, with Syngenta's actual experience with  
25 azoxystrobin products and said, okay, well, this is how much

1 Syngenta made year after year by selling their azoxystrobin  
2 products, and in order to get to the but for world of where  
3 would they have been without Willowood's infringement, you  
4 first start -- he adjusted the actuals with the budgets so the  
5 budgets are the first benchmark that he used. The reason he  
6 started with the budgets is, because he had discussions with  
7 Syngenta's employees. He had discussions about how that  
8 budgeting process goes.

9           What we have here up on the screen is an excerpt from  
10 his deposition transcript. Your Honor, we're happy to provide  
11 the Court with the full deposition transcript if needed, but  
12 the reason we highlight this is, that Willowood's counsel had  
13 every opportunity to question him about that budgeting process  
14 and why he felt that it was exacting and, in fact if  
15 you -- we're in Dr. Wilner's deposition transcript starting on  
16 page 231. Willowood's counsel says -- asks, you know:

17           "As I understand it, you had discussions with  
18 Syngenta personnel about how they do their budgeting."

19           His answer is: "I'm happy to talk about it." And  
20 then he asks about:

21           "Is it your opinion that the budgeting process is  
22 exacting?"

23           And he says: "No, it's not just what Syngenta told  
24 me, it is my opinion that they go through an exacting budgeting  
25 process."

1           If we go over to page 232 Willowood asked:

2           "Who did you talk to?"

3           And Dr. Wilner explained, I spoke with Mr. Cecil,  
4 Jeff Cecil who is head of the business. He said he spoke with  
5 Andrew Fisher, who is the projected lead for azoxystrobin who  
6 was involved in the initial preparation of the budgeting  
7 process. He spoke with Dr. Wichert, who is involved in  
8 shepherding the azoxystrobin business. He also talked with the  
9 Victoria Bublyk, who is the controller, and he explained, I  
10 talked with all of these individuals, I'm happy to talk about,  
11 you know, what they told me. And rather than going over the  
12 alleged budgeting inaccuracies, if they really believed that  
13 that was such a big factor that undermines the analysis, they  
14 would have asked him questions about it. All he said was -- if  
15 you go to the next page is: What you see on pages 29 and 30,  
16 is that sufficient? And his answer I think is very  
17 important -- I'm sorry, Your Honor --

18           THE COURT: Isn't that the answer right there, As you  
19 sit here today -- well, that's where the question is at the  
20 very bottom of 233, but the answer is on 234, right?

21           MR. SANTHANAM: It is on 234, Your Honor. He says,  
22 "As I sit here today, I believe that everything of great import  
23 is here. There are other facts that I determined that I  
24 learned from and which might be relevant if a certain topic  
25 gets raised by you, Mr. Jarosz or someone else, but in overall

1 generalities, I'm comfortable with Pages 29 and 30." And  
2 that's when they stopped it. They didn't ask him about the  
3 budget variations or what happens when you go within, you know,  
4 individual products or any of these issues that they say we  
5 don't know about the budget process. They didn't ask him about  
6 them. So that's number one. But they also had the ability --  
7 they did depose Mr. Cecil.

8 THE COURT: Of course they don't have to ask  
9 questions to make your expert's testimony admissible. Right?

10 MR. SANTHANAM: That is correct, Your Honor. But  
11 what the expert report serves as is to provide our expert's  
12 opinions and the basis of their report. It is not there to  
13 predict every possible argument that Willowood could possibly  
14 make and insert all of those arguments into the report. If  
15 they had questions or attacks that they wanted to pursue about  
16 the budgeting, they had ample opportunity to do so.

17 THE COURT: I have an opinion coming out that says  
18 something sort of like that. Watch your advance sheets. It  
19 doesn't say exactly that, but it does say an expert is not  
20 required to anticipate objections to his report in his initial  
21 report, but once those objections are made, you do sort of  
22 anticipate some response to it.

23 Did you all do rebuttal reports? I can't remember.

24 MR. SANTHANAM: It was not built into the schedule,  
25 Your Honor, but I do believe Willowood served one supplemental

1 report in this case.

2 THE COURT: Okay. So what is your intention when you  
3 get to trial?

4 MR. SANTHANAM: Exactly. So Your Honor asked who is  
5 Syngenta going to call for the underlying information. Well,  
6 they've deposed a few of them. Andrew Fisher, Rick Wichert,  
7 Jeffrey Cecil. Those witnesses are all on our trial witness  
8 list that we submitted last week. Victoria Bublyk, who is the  
9 financial controller who is listed on our witness list as well.  
10 And so these --

11 THE COURT: They were disclosed early on in  
12 connection with -- I always have to go back and look at the  
13 rules -- but something to give some hint that they would be  
14 talking about budgets and sales and lost profits and --

15 MR. SANTHANAM: Yes. They wanted discovery with our  
16 initial disclosures. Each of these individuals were  
17 identified. If Willowood wanted to believe that this was an  
18 area that they wanted to explore, the point is, that they had  
19 ample opportunity to explore.

20 Now the next issue I want to talk about is, we heard  
21 a lot about what Dr. Wilner specifically didn't do. There is  
22 so many variations that he didn't account for, market factors  
23 that he didn't account for.

24 If we can turn back to the slide deck and we go to  
25 slide 28. One thing we didn't hear about from Willowood in



1 their papers, conspicuously it wasn't in their papers and we  
2 didn't hear about it just a moment ago, are all of the  
3 confirmatory first story analyses that Dr. Wilner did in order  
4 to verify that his analyses were sufficient, that there was a  
5 reasonable probability for his damages.

6           With respect to, for example, the compound patents,  
7 Dr. Wilner used the intra-meso, that is a comparison between  
8 what Syngenta made with -- what Syngenta budgeted for  
9 mesotrione products versus what they actually made. But he  
10 then also looked at, well, how all of Syngenta's products  
11 perform. And he looked at how did all the crop protection  
12 products perform. He looked at the price impacts as a way to  
13 gauge, is my calculation sufficiently conservative? Am I way  
14 off base here? And none of that appears in their papers. They  
15 don't talk about his confirmatory analysis.

16           One other point that we would like to make, and this  
17 is, perhaps, one of the more important confirmatory analysis is  
18 at the bottom of slide 28.

19           THE COURT: Does somebody have a telephone on?

20           Go ahead.

21           MR. SANTHANAM: At the bottom of slide 28, Dr. Wilner  
22 additionally corroborated his analysis based on reality, actual  
23 experience, because the results that he gets through his  
24 damages calculations reflect the one year head start that  
25 Willowood got by infringing the compound patents, the two year

1 head start that they got by infringing the '138 Patent.

2 Can we go to the next slide, which is slide 29. We  
3 saw this slide a little bit earlier. I would like to explain  
4 why this slide -- this analysis confirms Dr. Wilner's analysis.  
5 On slide 29 we have his analysis of the but for world versus  
6 the actual world for the compound patents, and for each year he  
7 calculated a yellow bar or golden bar that says this is how  
8 much Syngenta -- you know, gross profits that they actually  
9 realized and then he calculated through his model what Syngenta  
10 would have obtained or would have garnered if it were not for  
11 Willowood's infringement.

12 What is interesting is, if you look at years 2014 and  
13 2015, again, this data is for the compound patents. If you  
14 look at the year 2014, what Syngenta actually made -- this  
15 yellow bar, and you look at 2015, what Syngenta would have made  
16 the next year but for Willowood's infringement, they're about  
17 the same. What that reflects is that Willowood had  
18 approximately a one-year head start into the market. So his  
19 damages analysis is confirmed by actual experience in the  
20 marketplace.

21 THE COURT: It doesn't look like it continues out.

22 MR. SANTHANAM: Pardon me, Your Honor.

23 THE COURT: Do you not have the same match-up for the  
24 future years?

25 MR. SANTHANAM: That's correct, Your Honor. That is

1 actually an important point. As part of his damages analysis  
2 if you look at just the red bars, that's in the but for world,  
3 imagine that Willowood is not in the marketplace. He didn't  
4 assume that Syngenta's profits would keep going up and up and  
5 up. He actually took into account that Syngenta's profits  
6 would decline and so that's why you see the decline from years  
7 2014 to 2015 and so forth. And what does that decline account  
8 for? Well, it accounts for potentially the presence of the  
9 generics, normal generic competition in the marketplace. It  
10 accounts for market factors such as, you know, fluctuations in  
11 commodities prices. All these things that Willowood says he  
12 didn't account for, it actually is reflected in the data.

13           He is not saying that Syngenta's profits would keep  
14 increasing. He's accounted for and said, I expect it to go  
15 down and I'm adjusting for it. At the end of the day what his  
16 data shows is that Willowood got -- is confirmed by the fact  
17 that Willowood got approximately a one-year head start for the  
18 compound patents.

19           If we can turn to slide 33. This is the data for the  
20 '138 Patent. And for the '138 Patent, we have a similar  
21 confirmation of Dr. Wilner's damages calculations. So you look  
22 at the year 2014, and what Syngenta actually made, that's the  
23 golden bar in 2014. It approximately lines up with his data in  
24 the but for world in 2016. Admittedly, they are not even and  
25 what that indicates is, that the head start that Willowood had

1 was probably a little bit more than two years and so the data  
2 shows that the damages that Dr. Wilner calculated are not only  
3 consistent with reality, but they are confirmed by the fact  
4 that Willowood was able to get into the market, you know, more  
5 than two years earlier than they otherwise would have.

6           We don't hear any of this in their papers. We didn't  
7 hear any of this when counsel for Willowood was up here, but it  
8 is not just that he relied on budgets, he relied on budgets,  
9 adjusted them with other budgets and then confirmed his  
10 calculations were conservative by looking at actual experience  
11 and reality.

12           Now if we can turn to slide 26. What we have here  
13 are the various comparabilities between the intra-meso bench  
14 marker he used and why it is appropriate in this instance to  
15 calculate the damages, at least for the compound patents, and  
16 why it will serve as a floor for the damages for the '138 and  
17 '761 Patents.

18           What Willowood writes in their brief and what we  
19 heard just a moment ago is, that Dr. Wilner just compared  
20 mesotrione because, you know, they are both well-established  
21 products. And they said that they have, you know, similar  
22 barriers to entry, but there is actually a range of  
23 comparabilities. This is the type of comparabilities, the  
24 evidence that the Federal Circuit talked about in the *Erickson*  
25 case, that if significant evidence of comparabilities between

1 the benchmark market and the market you are trying to  
2 extrapolate. What Willowood leaves out is, both of them are  
3 prepared using the same budgetary process.

4           So to extent they are saying Syngenta is wildly off,  
5 what they don't understand or what they don't appreciate or  
6 don't want to put into their papers is, that Syngenta has taken  
7 into account that those same market factors for mesotrione as  
8 they do for azoxystrobin. And why is that? Well, they are  
9 both not only an established product, but they are approved for  
10 the same major crops, which are corn on soybean. So what does  
11 that mean? It means they are going to be subject to the same  
12 type of market fluctuations as corn and soybean. They are  
13 going to be subject to the relatively same customer base that  
14 Syngenta uses and so that is why it offers a way of filtering  
15 out, you know, effects such as commodity prices, effects such  
16 as economic declines, et cetera, that Syngenta factors into the  
17 budgets, and on top has adjusted for them in order to make his  
18 analysis more conservative.

19           One other thing I would point out here is, that both  
20 mesotrione and azoxystrobin lost what we can generally call  
21 exclusivity around the same time. And why is that important?  
22 Well, the compound patents lost exclusivity -- well, they  
23 expired February 2014. Mesotrione lost data exclusivity in  
24 June of 2014. So what that means is, before that -- that sort  
25 of what Dr. Wilner calls almost a cataclasmic event. Before

1 that event there were significant barriers to entry for generic  
2 companies to get in. Come 2014, those barriers start getting  
3 broken down.

4           With respect to mesotrione, where Willowood was not  
5 present in the market, you can expect, perhaps, a normal level  
6 of generic activity, whereas for the compound, for  
7 azoxystrobin, Willowood was present in the market and so one of  
8 the advantages of using this intra-meso comparison is, it  
9 filters out what you would expect as sort of normal levels of  
10 generic competition to focus on what Willowood did in the  
11 marketplace.

12           Then finally, one of the -- the last comparison we  
13 have here on slide 26 is that both mesotrione and azoxystrobin  
14 were essentially on similar product life-cycle stages and at  
15 the same -- and for each of these products, Syngenta -- what  
16 they did as part of their well-planned post-patent strategy,  
17 post-exclusivity strategy is, they started introducing the next  
18 wrung on their brands ladder. So for azoxystrobin they  
19 introduced products that contained Solatenol as an active  
20 ingredient for mesotrione. They introduced the next wrung. So  
21 these are products that are going along around the same product  
22 life-cycle they have comparing in terms of the major crops that  
23 they are approved for. They interact very similarly. What  
24 Willowood tells in their papers is a very narrow view of  
25 comparisons between azoxystrobin and mesotrione.

1           At trial, we will be prepared to test -- to put on  
2 testimony that will explain all of these comparisons that fit  
3 within the framework of the *Erickson* decision that we cited in  
4 our briefs.

5           If we could --

6           THE COURT: Is this a good point to take the morning  
7 break?

8           MR. SANTHANAM: Yes, Your Honor, it is.

9           THE COURT: Let's take a ten minute recess.

10          (Recess taken from 11:20 a.m. to 11:32 a.m.)

11          THE COURT: Go ahead.

12          MR. SANTHANAM: I would like to start with one of the  
13 first issues that you mentioned that you wanted to hear from us  
14 about, which was the '761 Patent. With regard to that patent,  
15 I understand the issue the Court wants to hear about is  
16 what -- why there aren't non-infringing alternatives to the  
17 '761 Patent.

18                 One point I wanted to clarify is, that the issue  
19 isn't whether or not there are non-infringing alternatives.  
20 The issue is whether or not there are alternatives that  
21 Willowood could have switched to in time to get into the  
22 marketplace and obtain the same head start that they obtained  
23 through infringement, and that is a very important distinction.  
24 They may very well be able to spend years developing new  
25 processes.

1           THE COURT: They don't have to develop new ones, they  
2 can use '138.

3           MR. SANTHANAM: I'll get to that in a bit, Your  
4 Honor. But changing processes takes time. And when you change  
5 the process and you introduce that delay into the process such  
6 as -- and as an example I can reflect Your Honor to slide 20 of  
7 the slide deck that we provided.

8           Leading up to their attempt to get into the  
9 azoxystrobin market, Willowood had tried to investigate  
10 potential non-infringing alternatives; can we tweak the process  
11 this way? Can we tweak the process that way? Do we have to do  
12 an etherification process? They had discussions with their  
13 regulatory consultant, Pyxis Regulatory Consultant. The  
14 question was posed, well, if they could do this alternative, if  
15 it's viable, can we just go ahead and get it done? And the  
16 response that they got back from their consultant, which is a  
17 reasonable response is, changing -- proposing any change to a  
18 manufacturing process might be easy to agree to on paper, but  
19 in reality, a manufacturer would want to verify any change by  
20 running first on a small scale and then on a large scale --

21           THE COURT: Can you help me understand something?  
22 Just talking about the '761 Patent, how far out are you asking  
23 for -- what are you asking for damages for, through 2017?

24           MR. SANTHANAM: Dr. Wilner calculates damages through  
25 2017.



1           THE COURT: So it's your position, that even though  
2 the patent expired in 2015, nobody could have gotten up and  
3 running by 2017? Isn't that completely inconsistent with the  
4 chart that you just showed me which reflects that Syngenta  
5 planned on generics entering the market at the expiration of  
6 these patents?

7           MR. SANTHANAM: The response to that, Your Honor, is,  
8 if they were delayed sufficiently by a month or as the  
9 circumstances actually showed and witnesses testified by weeks,  
10 they wouldn't have made it into the market in 2014, possibly  
11 not even a good portion of 2015. And so what that -- that  
12 setback essentially pushes out Willowood's impact in the  
13 market. So they'll lose their head start and as result of that  
14 head start, the effects of that head start are going to  
15 continue to linger on into the market.

16           I guess a way to explain it would be, if Willowood  
17 got into the market, say, a year-and-a-half, two years ahead of  
18 what they should have, it is not just those first two years in  
19 which Syngenta suffers damages. The impact of their head start  
20 will continue to linger for a certain amount of time, and  
21 Dr. Wilner calculates that out through 2017, and that's -- you  
22 know, you can see that, for example, in the example under the  
23 chart that we saw which was, I believe on -- if we go to slide  
24 33. If you look at what he calculates in terms of his actuals,  
25 you can see that after -- and this is for '138, for example,

1 that his data shows is an approximate two year head start, but  
2 the actuals continue to -- that impact continues to linger on  
3 for an additional year. And if you sort of -- you push the  
4 data out and you crunch the numbers, it would linger on even  
5 further until the impact of Willowood's early market entry  
6 diminishes entirely.

7           What Dr. Wilner has done is, he's calculated just for  
8 2014 through 2017 the effect of that lingering impact.

9           THE COURT: I'm just reading what he says. He says,  
10 "There are no acceptable non-infringing substitutes in 2016 and  
11 2017." I just don't understand how that holds water. That  
12 seems contrary to Syngenta's own planning. You have to look at  
13 what non-infringing folks would have done had there not been  
14 the infringement, you know, so you have to imagine that  
15 Willowood didn't get the early entry, so surely by 2016  
16 Willowood or somebody else, including the two people who did  
17 get into the market, Cheminova, whatever its name was, and the  
18 other one I am forgetting right this second, you know, you have  
19 to imagine what they would have done, too. So I'm having a  
20 little trouble with that. He says there are none and that  
21 seems obviously wrong to me.

22           MR. SANTHANAM: Perhaps that statement needs  
23 clarification. The lack of non-infringing alternatives refers  
24 to the ability of Willowood to pick up right at, you know,  
25 switch immediately and jump to a new process, and they can't do

1 that. And part of the reason is, for example, when you run the  
2 process using DABCO verses without DABCO, one of the benefits  
3 of DABCO is, it allows you to run the reaction at a much lower  
4 temperature. That has implications about safety, the side  
5 reactions.

6 THE COURT: Syngenta made it without DABCO for years.  
7 Correct?

8 MR. SANTHANAM: That's correct, Your Honor.

9 THE COURT: And the use of DABCO did not give the  
10 consumer any benefits, correct? So isn't it just incremental?  
11 I mean, that gets us to a separate issue.

12 MR. SANTHANAM: Well, Your Honor, it's -- what it  
13 impacts is the time that it will take for Willowood to find a  
14 manufacturer --

15 THE COURT: To find?

16 MR. SANTHANAM: A manufacturer who has a process  
17 that -- if we prove our case, we'll prove that Willowood's  
18 manufacturer uses DABCO. The time that it will take for them  
19 to go from that process, which is operating at a very high  
20 temperature --

21 THE COURT: No, no. You assume non-infringement for  
22 your hypothetical world of damages. I don't understand what  
23 you just said to me.

24 MR. SANTHANAM: Okay.

25 THE COURT: I apologize.

1           MR. SANTHANAM: Your Honor, the crux of the analysis  
2 is, that what would be the amount of time that it would take  
3 Willowood's manufacturer to go from a process that uses the  
4 DABCO in an infringing manner and switching to a process that  
5 doesn't use DABCO in an infringing manner.

6           THE COURT: Why is that the issue? I thought that  
7 you -- okay. Let me find the case. Hold on. There is a case  
8 out there that says --

9           MR. SANTHANAM: Probably the *Minnesota Mining 3M*  
10 case.

11          THE COURT: It talks about what you would do -- you  
12 calculate the damages in the hypothetical world where Willowood  
13 did not infringe. Right?

14          MR. SANTHANAM: Correct. And so --

15          THE COURT: But you're calculating them based on your  
16 lost profits based on the fact they did infringe. Is that not  
17 right?

18          MR. SANTHANAM: In the hypothetical world in order to  
19 determine whether or not what would happen without Willowood  
20 infringing, the argument that Willowood, I presume is making  
21 is, well, we could have pursued a non-infringing alternative.

22          THE COURT: Here it is. *Grain Processing*, "a fair  
23 and accurate reconstruction of the but for market also must  
24 take into account, where relevant, alternative action the  
25 infringer foreseeably would have undertaken had he not

1 infringed."

2 MR. SANTHANAM: Correct.

3 THE COURT: And so not just Willowood, but if  
4 Willowood had not infringed, you would be looking at a totally  
5 different matter and you would have other people, other  
6 generics coming into compete.

7 MR. SANTHANAM: Right.

8 THE COURT: But he is not taking that into account  
9 with his '761 damages. Am I mistaken about that?

10 MR. SANTHANAM: I think to sort of get us back into  
11 the analysis, I think the case that is relevant to this issue  
12 is the *Minnesota Mining 3M* case that is cited in our brief.

13 In that case, the accused infringer made a similar  
14 argument. He said, well, the damages should be limited or  
15 there shouldn't be any damages because we had a non-infringing  
16 alternative. And what the Court said was, it's not just the  
17 existence of non-infringing, it has to be accessible to you and  
18 it has to be commercially viable.

19 In the case of the '761 Patent, if we go back to  
20 before -- right before Willowood came into the market, if they  
21 wanted to use an alternative process without DABCO, where are  
22 they going to go? They are saying they could get their  
23 manufacturer to do that, but what we know from the evidence is,  
24 their manufacturer uses DABCO, so it is going to take some  
25 amount of time for them to find somebody who is: A, willing to

1 manufacture without DABCO or in a non-infringing manner. And  
2 as their own regulatory consultant says, if you want to change  
3 the process, it is going -- you are going to have to start off  
4 on a small scale and build it up to a large scale and set up  
5 that manufacturing process. Well, all of that takes time. And  
6 the time is critical, as we saw through the circumstances,  
7 because in a matter of a week, matter of months would have  
8 gotten Willowood out of the market in 2014 and possibly a good  
9 portion of 2015.

10 THE COURT: Yes. I guess what I am really talking  
11 about is 2016 and 2017.

12 MR. SANTHANAM: Okay.

13 THE COURT: Maybe that's why we seem to be talking  
14 past each other.

15 MR. SANTHANAM: So depending on when Willowood gets  
16 into the market, the impact of Willowood coming into the market  
17 is going to have -- you know, it's not going to be just in one  
18 year. It is going to have an impact across a number of years,  
19 and if they got into the market in 2014, that impact might  
20 trail off, let's say in 2020. If they got into the market in  
21 2015, that impact may go on even further than that and so  
22 that's --

23 THE COURT: But he hasn't calculated it that way. I  
24 mean, I keep -- you know, do you know the -- let me see if I  
25 can locate exactly where he says it. He says as *Panduit*

1 factors one and three, this is on page 40, "As discussed in  
2 Sections 4A-1 through three and 3B, Syngenta meets the first  
3 three *Panduit* factors." So the second *Panduit* factor is a  
4 non -- an available non-infringing alternative.

5 MR. SANTHANAM: Lack of non-infringing --

6 THE COURT REPORTER: I'm sorry --

7 THE COURT: So the absence of an acceptable  
8 non-infringing substitute. After 2015, that assumption is -- I  
9 mean, your own client was planning to have generic competition,  
10 presumably non-infringing at that point, so how is  
11 that -- that's my problem. That's my problem.

12 I'm not hearing you explain -- he has a bad  
13 assumption in there. There is no evidence. Your own client  
14 assumes competition from generics by that point. So I'm just  
15 not really getting it for the '761 for 2016 and '17.

16 MR. SANTHANAM: It is the distinction between what we  
17 would call expected generic competition or normal level generic  
18 competition and what Willowood did in this instance in this  
19 case.

20 In terms of what Dr. Wilner puts forward, if they  
21 respected the patent rights -- and let's take the compound  
22 patents, for example, they wouldn't have been able to come  
23 in -- or, I'm sorry, the '138 Patent, they wouldn't have been  
24 able to come in until after the end of 2015.

25 What we do know is, they came in as early as 2013

1 doing things in the marketplace, introducing products in 2014,  
2 and they came in and aggressively marketed their products,  
3 dropped the prices in the marketplace.

4 THE COURT: How did he calculate it? Did he  
5 calculate it that way, because it doesn't look like that to me.  
6 I hear what you are saying, but is that what he did? Because  
7 it sounds like he didn't assume that. He assumed no  
8 competition from generics.

9 MR. SANTHANAM: No. That's not true, Your Honor. He  
10 did assume there would be competition from generics. And that  
11 is actually set forth in his deposition transcript. I'm happy  
12 to pull that portion of the transcript out.

13 Willowood actually asked him the exact same question.  
14 Well, Dr. Wilner, you're assuming that everything is related to  
15 Willowood, there wouldn't be other generics. And his answer  
16 was, No. He factors in normal levels of generic competition.  
17 And one of the ways he does that, at least for the compound  
18 patents and the '138 Patent is, he looks at the mesotrione for  
19 a comparison, and another scenario where the product went off  
20 exclusivity, experienced what would be normal levels of generic  
21 competition and used that to filter out what happened in the  
22 marketplace in the actual world with Willowood dropping the  
23 prices and engaging in the activities that they did. And so he  
24 does account for normal levels of generic competition.

25 We would be happy to point that out, Your Honor -- it



1 is within the transcript -- once we get an opportunity to take  
2 a break, we can inform the Court of where that portion of the  
3 transcript is.

4 THE COURT: Okay. Go ahead.

5 MR. SANTHANAM: In terms of why it matters to change  
6 the process. If you change the process from using DABCO to not  
7 using DABCO, for example, you're going to have to run the  
8 reaction at a much higher temperature. Their own expert  
9 acknowledges that. Their own expert also acknowledges that  
10 when you do that, you're going to -- when you do that -- we  
11 asked the question to Dr. Lipton: Is Azoxystrobin manufactured  
12 using the schemes one and two as opposed to using the method of  
13 the '138 Patent and one --

14 THE COURT: If you can slow down.

15 MR. SANTHANAM: -- can have a different  
16 (indecipherable) and he says, yes.

17 THE COURT: I don't understand. Are you saying you  
18 can't make it? Your client made it for years this way. I  
19 don't understand why this is important.

20 MR. SANTHANAM: It's not that they can't make it,  
21 Your Honor. It is how long would it take them to get that  
22 process up and running after running small scale tests, large  
23 scale tests and then also, how long it would get them to get  
24 their product through the EPA.

25 Now if we go to the next slide --

1           THE COURT: Your client assumed that would start  
2 happening. Right? Your client assumed that somebody would do  
3 that.

4           MR. SANTHANAM: Whether or not they respect the  
5 patent or not, they expected that people would come in, not  
6 necessarily that they were respecting the patent. So the  
7 assumption there is that the other folks that are coming in  
8 have these non-infringing alternatives, and that's not  
9 necessarily true.

10          THE COURT: Exactly.

11          MR. SANTHANAM: People may come in just like  
12 Willowood did. There is no evidence that the process that  
13 these other companies that actually did come in, that these  
14 companies used a non-infringing alternative, and that's one of  
15 the arguments that Willowood would make, they said, well,  
16 Syngenta hasn't sued Albaugh. Syngenta hasn't sued Cheminova.  
17 So they must have a non-infringing alternative. But there is  
18 no evidence in the record of any Albaugh products being tested,  
19 that their process has been looked at, et cetera. And just  
20 because Syngenta expected that perhaps generics would come in,  
21 doesn't mean that they automatically and presumably have  
22 non-infringing alternatives.

23          THE COURT: You're just arguing against yourself.  
24 You are just saying -- I don't know. I don't get -- I'm having  
25 a lot of trouble with that passing the -- well, that may be a

1 little bit of an exaggeration. Your own client was planning  
2 for this. They expected it to happen. They were making a lot  
3 of money. I mean, that's part of your case, right, you were  
4 making a lot of money on this product. You have expected  
5 generic competitors to enter the market, so you were going to  
6 have to drop your price and create these ladders and add these  
7 other things in order to deal with that competition. What you  
8 are telling me now is, oh, well, that wasn't really going to  
9 happen.

10 MR. SANTHANAM: Well, it was not that it wasn't going  
11 to happen. They did predict or take into account that generics  
12 might come in. What they didn't necessarily assume from that  
13 is, that they would be coming in with non-infringing  
14 alternatives. That's an assumption Willowood makes. They are  
15 saying these generics must be using non-infringing  
16 alternatives, but we haven't seen a shred of evidence from  
17 experts' testimony or otherwise from Willowood saying they used  
18 a non-infringing alternative. But beyond just the time to  
19 entry, it is also a cost proposition.

20 THE COURT REPORTER: I'm sorry, a what? Counsel, I  
21 didn't hear you.

22 MR. SANTHANAM: A cost proposition. If they are  
23 going to switch to another alternative, they are going to have  
24 to expend the money and resources to test it out on small  
25 scale, test it out on large scale, use different equipment if

1 you are running the process at a higher temperature, that's  
2 going to require different manufacturing vessels. It is going  
3 to require a process that is going to be more expensive. So at  
4 the end of the day, Willowood hasn't identified a single  
5 manufacturer that they could have gone to that they would have  
6 used. And they may dispute that, but the record evidence shows  
7 that the two generic -- two options that Willowood might have  
8 had was Tai He and CAC Shang Hi.

9           The testimony that we've seen from their 30(b)(6)  
10 witness on testing, Mr. Brian Heinz said that samples of  
11 azoxystrobin from both of those entities have been tested and  
12 have been confirmed to have DABCO in them. There is not a  
13 single entity in the record that Willowood can point to and say  
14 we could have used this other entity. It is a matter of, well,  
15 how long would it have taken? Would they have been interested?  
16 All of these things need to be taken into account. We haven't  
17 seen any of that.

18           The *Minnesota Mining 3M* case goes to the proposition  
19 that you can't just point to alternatives, you have to show  
20 that they were available to you and that they were commercially  
21 acceptable.

22           So for those reasons, the '761 Patent, in calculating  
23 the damages, Dr. Wilner reasonably assumed and reasonably found  
24 that they wouldn't have been able to switch to an alternative  
25 that would have avoided the head start that Willowood got

1 otherwise.

2           If Your Honor will permit, the last issue I wanted to  
3 touch on was the formulator's exemption. In terms of the  
4 formulator's exemption, as we set out in our briefing, the  
5 factual circumstances are extremely intertwined between what  
6 Willowood did in seeking the formulator's exemption and the  
7 patent infringement claims that are going to trial. Among  
8 other things, the record shows that they were trying to get a  
9 head start in the marketplace, that they were racing to get  
10 into the market in 2014, and in seeking the formulator's  
11 exemption, the statements that they made to the EPA reflect  
12 their effort to get into the marketplace early and to be able  
13 to sell it. It reflects the fact that they were willing to go  
14 to great lengths to get into the marketplace in order to be  
15 able to sell within 2014.

16           All of that goes to not only the early market entry  
17 that Willowood obtained, but also the issue of wilfulness. The  
18 lengths they would go to in order to get the product into the  
19 market. And for those reasons, Willowood --

20           THE COURT: Now, is wilfulness -- let me see -- I got  
21 the verdict sheet you all submitted yesterday. You are asking  
22 for wilfulness on the compound patent, the '138 Patent and  
23 the -- all four of them. Go ahead.

24           MR. SANTHANAM: What the background on the  
25 formulator's exemption shows is, they needed to get into --

1 they believed they needed to get into the marketplace by a  
2 certain time frame and they were willing to go to lengths to  
3 get their product in the marketplace.

4           You know, they could have gone through alternative  
5 routes to get it in the marketplace, but they chose to import  
6 products -- azoxystrobin in 2014. They tested that product by  
7 inducing other companies to use that azoxystrobin in 2013, and  
8 they submitted all of this as part of their formulator's  
9 exemption and told the EPA that we are using Syngenta's  
10 azoxystrobin as our source.

11           All of those circumstances underlie and are  
12 intertwined with the patent infringement claims in the case  
13 because it goes to show, you know, what Willowood's efforts  
14 were and how they obtained the head start that they obtained in  
15 the case.

16           So for those reasons, this is not a 404(b) situation.  
17 It is a situation that explains precisely why, you know, the  
18 reason why Syngenta suffered damages in this case, the ability  
19 of Willowood to obtain that head start.

20           THE COURT: Okay. You've used up all your time, but  
21 I have a question before we turn back, and this is something I  
22 would like Willowood to address, too, on rebuttal, and that's  
23 the Entire Market Value Rule and the '761 Patent, because it  
24 seems like it is an incremental improvement, and yet you are  
25 trying to get damages for as if it were not. Tell me why

1 that's wrong or what I misunderstand.

2 MR. SANTHANAM: And it is not necessarily an  
3 application of the entire market value. Under that rule if you  
4 have multiple components of a product and they function  
5 together and, you know, they are being sold as a single  
6 product, the damages can and should be calculated based on the  
7 entire product.

8 There is no dispute here that -- Willowood may  
9 dispute it -- but Dr. Wilner has put forth in his opinion and  
10 in his analysis, that the product that is being sold, these  
11 azoxystrobin products, what is in demand for these azoxystrobin  
12 products is the azoxystrobin.

13 THE COURT: Exactly.

14 MR. SANTHANAM: The azoxystrobin is being  
15 manufactured by using the DABCO Patent, the '761 Patent.

16 THE COURT: By what?

17 MR. SANTHANAM: The '761 Patent. And those are the  
18 allegations that Syngenta has put forth. And it is not a --  
19 again, it goes to the head start. Well, what would it have  
20 taken them to find an alternative. They had an alternative.  
21 Those circumstances aren't there in the record.

22 All we know is, they reached out to one other  
23 manufacturer. Their own 30(b)(6) witness says, you know, their  
24 product has been tested and has DABCO in it.

25 So in this instance we're not presented with, you

1 know, any alternative to what Willowood has done or that we  
2 intend to prove Willowood has done. And so as part of that,  
3 the damages are calculated based on the head start that  
4 Willowood obtained and it is that head start that is driving  
5 Dr. Wilner's calculation.

6 THE COURT: Okay. Thank you. All right, go ahead.

7 MR. TILLER: Your Honor, a couple quick points.  
8 First of all, you asked about whether these witnesses -- there  
9 was some discussions with Mr. Santhanam about whether they were  
10 going to put on evidence at trial about the budgeting process,  
11 and Mr. Santhanam said, yes; Mr. Cecil, Dr. Wichert, two other  
12 people whose names are escaping me at this exact moment. You  
13 asked Mr. Santhanam were they identified and, yeah, they were  
14 identified.

15 I think you made an interesting statement about an  
16 opinion that is going to be coming out very shortly from Your  
17 Honor saying an expert doesn't have to anticipate every  
18 objection that may be made in his report.

19 Two points to that. First of all, he does have an  
20 obligation to prove his point. He does have an obligation to  
21 adhere to the law that says here is what you have to do in  
22 order for your point to be heard.

23 Second, a party need not have to try to anticipate  
24 every damages theory that another party may make, particularly  
25 when that party asks the question.



1           So let me get to that point. In the interrogatories  
2 we asked the pretty typical damages question: What are your  
3 damages going to be? How did you get to them? While I concede  
4 that in answers to interrogatories you don't have to have  
5 chapter and verse of every single little detail, there were no  
6 details in Syngenta's answers to interrogatories. I apologize,  
7 I don't have them with me. I was frantically looking for them  
8 on my system.

9           In response to that question, Syngenta strung off a  
10 long citation of documents, we intend to rely on Bates label  
11 this to this and this to this and this to this, and our expert  
12 will disclose our theories and our numbers. So nowhere in that  
13 answer to interrogatory was a number or whatever. No where in  
14 that answer to interrogatory was there a basic skeletal  
15 framework for the theory.

16           So I'll be candid. We went into those depositions,  
17 Mr. Cecil, Dr. Wichert and others thinking, okay, they could  
18 use a lost profit on lost sales analysis, which he didn't.  
19 They could use a price erosion analysis, which he didn't. They  
20 could use a reasonable royalty analysis, which he didn't.

21           We asked questions about profit margins and cost of  
22 goods sold and prices -- you know, why did you do -- all of the  
23 questions that would go to those theories, because at that  
24 point we had no information one way or the other.

25           Fact discovery closes, expert report comes out and we

1 get this report. That isn't a price erosion theory. That  
2 isn't a lost profit and lost sales, isn't reasonable royalty.  
3 Isn't any of the theories, as I think Your Honor even pointed  
4 out earlier today, this isn't the sort of normal way that  
5 benchmarks are used.

6           So honestly, while we will have the opportunity to  
7 cross-examine him and while theoretically we had the  
8 opportunity to cross-examine him at that depositions on these  
9 issues, we didn't know this was coming. I'm going to be very  
10 honest. Maybe I should take some of the blame for that, but I  
11 did not -- this was not one of the theories that I was thinking  
12 of for damages. So we did not ask the questions about how do  
13 you do your budgets, what --

14           THE COURT: Because you are saying you had no idea  
15 they were going to use budgets in calculating damages.

16           MR. TILLER: All we got was a string cite of, here  
17 are the Bates numbers for the documents on which we are going  
18 to rely on. And looking back on that now, some of the  
19 spreadsheets that were identified in Dr. Wilner's reports  
20 regarding the budgets were identified, but the fact that that  
21 was going to be the basis, the fact that that was going to be  
22 the theory, didn't know it, to be quite candid.

23           So we will be going into the trial not having heard  
24 any testimony about their budgeting process and, quite frankly,  
25 not really having been tipped off that the budgeting process

1 was going to be such a major component of the later offered  
2 Wilner report. So I just wanted you to understand that timing.

3 When Mr. Santhanam pointed you to page 26 of their  
4 Power Point presentation which they offered, Mr. Santhanam  
5 talked about the intra-meso comparisons as an appropriate  
6 benchmark. There was a lot of discussion about how mesotrione  
7 factors in all of the different market conditions, but that was  
8 Mr. Santhanam telling you that. That wasn't Dr. Wilner telling  
9 you that. Dr. Wilner does not offer anything in that regard in  
10 his report.

11 Again, when asked at his deposition, and I think Your  
12 Honor pointed it out, my colleague said:

13 "As you sit here today and you look at pages 29 to  
14 30, is there anything else they told you," meaning Syngenta,  
15 "about their budgeting process that you regard as important to  
16 your determination that their budgeting process could be used  
17 in this case, anything other than what appears in pages 29 and  
18 30?

19 "Answer: As I sit here today, I believe that  
20 everything of great import is here. There are other facts that  
21 I determined and I learned from that which might be relevant if  
22 a certain topic gets raised by you, Mr. Jarosz or someone else,  
23 but in overall generalities, I am comfortable with pages 29 and  
24 30."

25 "Question: Did you conduct any analysis on your own

1 as to the accuracy of Syngenta's budget process?"

2 "I did," was the answer.

3 "Question: And does that appear in your report?"

4 "Answer: I think I talk about it, but I did not do  
5 any quantification."

6 So he -- I think that excerpt is telling in that Dr.  
7 Wilner is saying, listen, what I need to come up with my  
8 analysis is laid out in pages 29 and 30.

9 Your Honor, we would submit, again, that what is laid  
10 out in pages 29 and 30 is not enough. You cannot make  
11 conclusionary allegations. The Federal Circuit has said that  
12 time and time again and those -- I understand Your Honor may  
13 disagree, but I see all of those statements on pages 29 and 30  
14 as being nothing but conclusory statements.

15 There were -- some emails were shown to you by  
16 Mr. Santhanam talking about how even Willowood recognized that  
17 it would be difficult to go to a new process, when you were  
18 talking about the incremental benefit of '761, and whether  
19 there was a non-infringing alternative. I just want Your Honor  
20 to be aware that this email that is on slides 19 and 20 of  
21 their presentation, were not talking about the differences  
22 between '761 and '138. They were talking about the  
23 different -- about the potentiality of going from '138 to  
24 something else. So these emails are taken entirely out of the  
25 context for what the discussion was. You asked about the

1 entire market rule.

2           Your Honor, one thing Mr. Santhanam and I agree on  
3 is, that this is not a perfect application of the Entire  
4 Markets Rule. We've all read the cases. But I think your  
5 question raises the important point. The Section 284 of the  
6 Act makes it clear that for the infringement, the infringement  
7 has to be -- or the damages must be to compensate for the  
8 infringement of whatever patent is at issue. You hit it on the  
9 head, Your Honor, when you said and you questioned  
10 Mr. Santhanam about it is, that Dr. Wilner's analysis is based  
11 on the sale of the azoxystrobin, the product, not the  
12 incremental benefit of the, whatever, the fact that the '761  
13 allows you to do it faster or that you get a better yield.

14           There is evidence in the record that -- and  
15 Dr. Wilner testified to it. He said something along the lines  
16 of using '761 versus '138, makes things about ten to 20-percent  
17 more efficient. If that's the evidence, then that efficiency  
18 should be what you are provided damages for, not for the sale  
19 of the product that results.

20           Lastly, Your Honor, just going back to the  
21 formulator's exemption issue. What Mr. Santhanam -- what  
22 Syngenta is doing is really mixing apples and oranges here.  
23 They are trying to circumvent your ruling getting rid of the  
24 formulator's exemption cause of action and back-dooring it and  
25 saying, well, it is relevant to wilfulness. Again, it is not

1 relevant to wilfulness. It is relevant to whether Willowood  
2 violated the formulator's exemption. That claim has been  
3 thrown out.

4           What will happen, what I am positive is going to  
5 happen is, they will make statements that, well, you did  
6 something illegal by making this statement and that statement.  
7 Then we have to come in and say, no, that's perfectly proper,  
8 it is perfectly customary. What they are trying to do is to  
9 get damages under a theory of wilfulness for violating the  
10 formulator's exemption. That's not permitted. Wilfulness is  
11 whether we wilfully infringed the patent. We don't think we  
12 did.

13           We understand that they've made that allegation. We  
14 understand that there may be evidence in that regard. We  
15 disagree with it. We're ready to fight it and what have you,  
16 but whether we infringed the patent wilfully, has nothing to do  
17 with the statements we made to the EPA. The statements we made  
18 to the EPA are not evidence of infringement. And, it is not  
19 evidence of our mindset with regards to infringement of the  
20 patent. It might be relevant to our mindset with regard to the  
21 formulator's exemption and EPA regulations, but those claims  
22 have been dismissed.

23           Thank you, Your Honor.

24           THE COURT: Let me look through my questions here to  
25 see if you all covered everything I wanted to know.

1           Let me ask Syngenta. Am I correct or am I not, that  
2 you do not intend to compare the way that azoxystrobin and  
3 mesotrione sales related to budget figures in the patent? In  
4 other words, you do not intend to say mesotrione is an  
5 appropriate benchmark because in the past our budget -- the  
6 variation between actual sales and budget varied the same for  
7 mesotrione as it did for azoxystrobin. Did I ask that clearly?

8           MR. SANTHANAM: I think I understand your question,  
9 Your Honor. So for purposes of damages that Dr. Wilner did,  
10 we'll focus on the years in which he did the analysis. So  
11 2013, 2014, 2015, '16, '17. To the extent that he gets  
12 cross-examined on earlier budgets, we may introduce testimony,  
13 but the analysis was based on the budgeted data, the actual  
14 data for 2014 to 2017.

15           THE COURT: Okay. I guess it just seems --

16           MR. SANTHANAM: The answer is, if Willowood brings it  
17 it up, we will of course address it. If they bring it up as an  
18 attack on his damages analysis, we will respond to it.

19           THE COURT: I guess I'm trying to be sure that I  
20 understand. Isn't the best way to show that you ought to  
21 modify your client's budget figures by the mesotrione  
22 variation, to say, well, in the past it was -- they say they  
23 were in tandem. And by not doing that, it just seems like a  
24 really big gap to me. I don't know. I'm not an economist.  
25 I'm not a numbers person. I'm just like those people who are

1 going to be sitting over there saying you're telling me they're  
2 the same and yet you didn't look to see if they were the same,  
3 and he didn't look.

4 MR. SANTHANAM: I believe he did look. He testified  
5 that he did look, but admittedly, that was not set out in his  
6 report. To the extent that that's an attack that Willowood  
7 makes, Dr. Wilner -- we will introduce his testimony to respond  
8 to it, but in terms of addressing past budgets, you know, as we  
9 pointed out in our briefing, there are explanations. There are  
10 reasons for the budget variations that Willowood complains  
11 about.

12 The one other point I want to make is, we're not  
13 dealing here with, you know, product-to-product comparisons.  
14 What Dr. Wilner did wasn't saying, well, mesotrione sold at X  
15 price, therefore, azoxystrobin should have sold at something  
16 within the vicinity.

17 THE COURT: Right.

18 MR. SANTHANAM: He was using what Syngenta  
19 experienced between their budget and actuals as a way of  
20 filtering out a potential variation in budgets, other market  
21 factors, et cetera, on top of the analysis that he did.

22 THE COURT: In order to show that's a good benchmark,  
23 the best way to show it is the patent.

24 MR. SANTHANAM: That is one way of showing it, Your  
25 Honor. The other way of showing it is, well, where does the



1 data lead us. And all the confirmatory analysis that he's  
2 done -- and in terms of confirmatory analysis we went through,  
3 he looked at other benchmarks, a variety of other benchmarks,  
4 all products, crop protection fungicides, the price index and  
5 then he also looked at where his data fell and he showed that,  
6 well, for the compound patents, we see a one-year head start.

7 THE COURT: I remember all of that part. Okay.

8 MR. TILLER: Mr. Santhanam, you hit on that is a  
9 great way to prove the mesotrione benchmark makes sense and  
10 that's a great way to prove that the crop protection benchmark  
11 makes sense, that they sort of track each other on a  
12 year-by-year. Mr. Santhanam says, well, if Willowood  
13 cross-examines Dr. Wilner on that point, then they'll deal with  
14 it. Here is the problem with that: We haven't been given the  
15 data. As evidenced by what we gave you for crop protection  
16 fungicide sales, for mesotrione budget and sales we've been  
17 provided from 2012 forward. We have no ability to go back and  
18 say, well, in 2011 they were this different and 2010 they were  
19 this different and in this 2009, they were this different. We  
20 don't have that ability, and I think Your Honor is picking up  
21 on that.

22 THE COURT: You could have asked for that.

23 MR. TILLER: We did. We asked for everything on  
24 which -- I mean, let me step back for a minute. We asked for  
25 everything that was relevant to their data, you know, for their

1 damages analysis. We didn't know mesotrione budgeting was  
2 going to be part of their analysis. We didn't know crop  
3 protection fungicide sales was going to be part of their  
4 analysis. They have provided us this limited window of data on  
5 which they are relying, but to test that data we --

6 THE COURT: But once you got Dr. Wilner's report, I  
7 mean -- I don't know, you could have asked then, right? I  
8 mean, you could have --

9 MR. TILLER: I mean, fact discovery was closed, was  
10 the problem. I mean, I can't go back -- I guess I could have  
11 come in and asked you to reopen fact discovery. I guess maybe  
12 I could have. But fact discovery was closed and the fact of  
13 the matter is, Judge, what I think is going on here is that up  
14 and down that you are saying, well, wouldn't that be a good way  
15 to show it. I bet there is a reason they don't want us to have  
16 that data, and it hasn't been provided.

17 I just wanted Your Honor -- so when Mr. Santhanam  
18 says we can cross-examine Dr. Wilner on that, we can't, because  
19 we don't have the data.

20 MR. SANTHANAM: If I may briefly respond to that.  
21 Mr. Tiller had raised the point of interrogatories, well, we  
22 had asked. They served an interrogatory asking for the  
23 evidence -- the evidence that we will be relying on for our  
24 damages. We gave them a very detailed interrogatory response.  
25 It wasn't simply a list of Bates numbers as Willowood's counsel

1 makes it seem. There were parentheticals saying these are what  
2 the products are, these are what the budgets are, and at no  
3 point did we hear any complaint that that was insufficient.  
4 They didn't have the information, et cetera. At no point have  
5 they asked for budgets beyond a certain year.

6           The implication that Syngenta may be hiding something  
7 as a result of not providing something is just completely  
8 unfounded. Had the request been made, the information would  
9 have been provided. And they had ample opportunity to do it  
10 through fact discovery and in expert discovery.

11           One point I will mention is, they deposed Dr. Rex  
12 Wichert during fact discovery. As part of his testimony, he  
13 discussed mesotrione and the comparability between mesotrione  
14 and azoxystrobin. This is well in advance of Dr. Wilner's  
15 report.

16           At no point did we hear anything about interrogatory  
17 responses being deficient. They didn't even send a discovery  
18 letter. They certainly didn't file a motion to compel. But  
19 the suggestion that Syngenta is perhaps hiding something is  
20 grossly unfounded.

21           THE COURT: Okay. Well, I'll let the defendants  
22 submit the interrogatory answer that you are talking about. I  
23 assume you can do that in 48 hours?

24           MR. TILLER: Absolutely, Your Honor.

25           THE COURT: And if there is any context that is

1 needed, why don't you all consult.

2 MR. TILLER: How would you like us to do that?  
3 Through ECF?

4 THE COURT: Yes. Call it a supplemental exhibit or  
5 something like that. Just share it in case -- if the plaintiff  
6 wants, you know, the page before or page after.

7 MR. TILLER: We'll put in the whole thing.

8 THE COURT: If you put in the whole thing --

9 MR. TILLER: I'll point you in the notice as to which  
10 answer to interrogatory it is. I don't want to get accused of  
11 anything.

12 THE COURT: Let's turn to the second motion. Let's  
13 see. How long are you all thinking this might take? It's  
14 Syngenta's motion so, Mr. Santhanam, how long do you think you  
15 might take on this?

16 MR. SANTHANAM: I think, Your Honor, since we touched  
17 upon most the damages principles, probably would need about 20  
18 minutes.

19 THE COURT: Okay. Does that sound about like what  
20 you would need?

21 MR. TILLER: I'll do it in less.

22 THE COURT: Let me just look through my questions.  
23 One thing I would like to understand better -- the brief and  
24 the motion is phrased in terms of commercial reasonableness, so  
25 I go to Lexus. Actually, I went to Westlaw, but same thing. I

1 put in commercial reasonableness, Fed Circuit. I get no patent  
2 cases. There is some federal claims cases. I put in  
3 commercially reasonable, no patent cases. I try, you know,  
4 everything I could think of -- and I read your briefs and  
5 nobody -- the law doesn't talk about commercial reasonableness.

6           So I need a little context here for this. And that  
7 is your phrase, Syngenta's phrase, so I don't know -- I mean, I  
8 assume it has something to do with non-infringing alternatives.  
9 I'm not really clear about that. I want to know why did you  
10 use this phrase and what -- give me some context for that.

11           The other thing I want to know, it seems to me that  
12 to the extent we are talking about whether there are acceptable  
13 substitutes to particularly '761, but maybe '138 as well. This  
14 is relevant not only to damages but also to infringement. I  
15 just want to be sure that I'm correct about that.

16           It also seems like you all kind of were talking about  
17 something maybe that we're going to get in motions in limine,  
18 because there is very little expert testimony, so I don't know  
19 what you're trying to exclude. I'm a little unsure.

20           I understand there is a big dispute throughout about  
21 non-infringing alternatives, but this motion is directed  
22 exclusively to this very narrow thing. They have said in their  
23 papers, well, all we're going to offer is what came out in  
24 discovery, these very limited opinions of Dr. Lipton and when  
25 you get to damages Mr. Jarosz, but that's going to be based on

1 this other evidence, nonexpert evidence of non-infringing  
2 alternatives. Okay.

3 Mr. Tiller is nodding up and down, so I'm  
4 understanding his position correctly. So that's sort of my big  
5 picture question here.

6 Further, I have one other point about that. Beyond  
7 what they have to prove, you have to prove non-infringing  
8 alternatives before you can get lost profits. So they are  
9 entitled to contest and challenge your evidence in the same way  
10 you were just arguing a few minutes ago about how they don't  
11 have any real proof that they could buy this on the market or  
12 could have bought it in the relevant time frame. You know,  
13 they get to contest your evidence, too. So I guess I'm trying  
14 to figure out exactly what you want me to do here.

15 MR. SANTHANAM: Yes, Your Honor. I'll give you an  
16 overview. So we're here on slide 13. Part of the phrase  
17 commercial reasonableness, we use that to sort of capture a  
18 number of things.

19 THE COURT: I'm sorry, what?

20 MR. SANTHANAM: To capture a number of things. The  
21 thrust of Syngenta's motion is, they haven't offered any  
22 opinions on this, so it's not that they've offered an opinion  
23 and we're trying to say it is unreasonable that the person --  
24 you know, that it's not -- they don't have a basis for it, et  
25 cetera. There is no disagreement here that they haven't

1 offered opinions. There are no opinions in the record about  
2 commercial reasonableness -- of the commercial reasonableness  
3 of various processes for the making of azoxystrobin. Why is  
4 that relevant? Well, we believe that the reason Willowood  
5 wants to introduce opinions on commercial reasonableness -- and  
6 perhaps a better way of phrasing it might be commercial  
7 acceptableness.

8           If you look at the case law -- we have two cases here  
9 on slide 13. This is the *Minnesota Mining* case, or the *3M* case  
10 that I've been referring to. It is 976 F 2d 1559. Also the  
11 *Datascope Corp* case.

12           What those cases stand for is the proposition that,  
13 yes, under the *Panduit* factors, *Panduit* factor number two, you  
14 know, Syngenta needs to demonstrate lack of non-infringing  
15 alternatives. The cases also say, well, it's not to go out and  
16 overturn every single possibility that Willowood might throw at  
17 us. And in particular in the *Minnesota Mining* case, the *3M*  
18 case, the Federal Circuit said, well, the alternatives that you  
19 are pointing to were not commercially viable. Nobody would  
20 have used them. So it is one thing for Willowood to say there  
21 might have been alternatives that on paper, you know, if use  
22 these chemical reactions you might end up with azoxystrobin.  
23 What they haven't put forth evidence of is why would that be  
24 commercially reasonable? Why would it be commercially  
25 acceptable? Why wouldn't a manufacturer or supplier of

1 azoxystrobin switch to that alternative? Would they have done  
2 that? What would the consequences be? How much more expensive  
3 would it be? Are there obstacles such as the materials you  
4 need, the vessels that you need, the temperature, safety  
5 considerations? All of these things go into whether or not  
6 that particular process is commercially reasonable,  
7 commercially acceptable, et cetera.

8           What we've heard from Willowood is, well, you could  
9 have done it with a two process -- you know -- let me step  
10 back.

11           So with regard to the '138 and '761 Patents they have  
12 asserted that, well, you could practice these alternative  
13 schemes, schemes one and two that are set forth in the compound  
14 patents and those would have been a non-infringing alternative  
15 for Willowood.

16           What they haven't demonstrated or put forth in this  
17 case is any expert opinion that says, well, you could have  
18 actually manufactured it on a commercial scale, that anyone has  
19 done it, that it would be feasible or how long it would take  
20 for them to do it. Those factors are important, because what  
21 we're talking about in this case is a head start.

22           Now perhaps Willowood could spend -- or, you know,  
23 find somebody who is willing to spend years, you know,  
24 developing these small-scale processes and turning them into a  
25 commercially manufacturable process, but there has been no



1 evidence of that in the record. So that's one component.

2 THE COURT: Okay. So the only thing I saw that  
3 they -- in terms of expert opinion -- you know, they rely on  
4 your expert, is it Dr. Fortonak?

5 MR. SANTHANAM: Fortonak.

6 THE COURT: That it is possible to make azoxystrobin  
7 using schemes one and two. They rely on some things that  
8 Dr. Witten said. I assume there was at least a way in which  
9 he's an expert. You know, you don't really get to complain  
10 about that. Okay.

11 MR. SANTHANAM: Sure.

12 THE COURT: Then the only other thing  
13 experts -- well, maybe -- I mean, Mr. Woo testified, but he's a  
14 fact witness. Is Dr. Lipton's opinion that Tai He's process  
15 could be conducted in a reasonable time and with a reasonable  
16 yield of azoxystrobin without the use of DABCO. Okay. That's  
17 in his report. So I don't understand --

18 MR. SANTHANAM: It isn't in his report, Your Honor.  
19 The phrase, "it could be done in a reasonable time and a  
20 reasonable manner," that comes from Willowood's counsel. What  
21 Dr. Lipton actually says in his report, he says, if I look at  
22 the reaction on paper and look at how fast one reaction runs  
23 and how fast another reaction runs, Willowood's supplier could  
24 manufacture azoxystrobin within a certain speed. He doesn't  
25 say anything about, well, what would it entail for Willowood to

1 manufacture. What would be the changes that they would need to  
2 make it in the manufacturing process.

3 THE COURT: So can't he testify about those things?

4 MR. SANTHANAM: That's precisely what we're asking.  
5 We're not saying that Dr. Lipton can't take the stand and say  
6 I've done this calculation and on paper the reaction would go  
7 at this speed. What they shouldn't be allowed to do is come in  
8 and say, I've investigated this progression, or based on my  
9 experience I know it is going to be commercially reasonable  
10 that suppliers would take this process and carry it out to a  
11 point where they could supply azoxystrobin to Willowood using  
12 that process. That is the leap that Willowood should not be  
13 allowed to take.

14 In this case to this point they pointed to potential  
15 alternatives. And we're not saying they can't identify those  
16 potential alternatives. What they shouldn't be allowed to say  
17 is, it is commercially reasonable that a manufacturer would  
18 have taken it, that they would have developed it and that they  
19 would have been able to do it as efficiently or nearly as  
20 efficiently and would have been able to do it within the time  
21 frame.

22 THE COURT: When I read their briefs in response to  
23 your motion, I didn't see that they said they were going to try  
24 to do those things so --

25 MR. SANTHANAM: In footnote one, I believe of their

1 brief, Your Honor, they do make that suggestion.

2 THE COURT: Okay.

3 MR. SANTHANAM: Actually, it is at the end of their  
4 brief. If you will give me a moment, I'll pull up the brief.  
5 If you look to the last footnote -- this is page ten of their  
6 opposition brief. You know, they indicate that they are going  
7 to try to use non-infringing alternatives to show that, for  
8 example, it was an incremental benefit of -- these process  
9 patents were incremental improvements. Part of that analysis,  
10 Your Honor, is, well, it is only incremental if somebody can  
11 pick it up and use it and use it to make azoxystrobin.

12 In this case there has been no evidence put forth in  
13 the record that says they could pick up an alternative  
14 manufacturing process, do all of the development work that is  
15 necessary to ramp it up and use it on a commercial scale to  
16 make azoxystrobin, and that goes to the heart of whether or not  
17 this is an incremental improvement.

18 In terms of --

19 THE COURT: I continue to just be completely and  
20 totally flummoxed by this argument that you are making. Your  
21 client made azoxystrobin for years under the '138 Patent, and  
22 you want to come in here and say it is impossible for Willowood  
23 or somebody else to do it, even though your client did it for  
24 years. I apologize. That just seems crazy to me.

25 MR. SANTHANAM: Your Honor, the analogy that

1 Dr. Wilner put forth at his deposition was, one can always go  
2 back in the horse and buggy instead of an automobile. What  
3 matters here is, if the most efficient way, the most reasonable  
4 way of manufacturing azoxystrobin is with DABCO, why would  
5 somebody go back to a process that didn't use --

6 THE COURT: Because your client was making a whole  
7 lot of money selling it, and if they could undercut the price  
8 by 50-percent using a process that was only 20-percent more  
9 expensive than your process, then they get to make a lot of  
10 money. I'm not an economist but, I mean, is that not so? And,  
11 I mean, I don't know the numbers, obviously.

12 I don't have the whole case in front of me, but it  
13 just seems kind of -- I mean, you are asking for millions and  
14 millions of dollars, so when you come in here and say, oh, it's  
15 not worth the investment, well, your own evidence disproves  
16 that.

17 MR. SANTHANAM: Your Honor, in that regard, they  
18 pointed to, as you mentioned, testimony from Dr. Fortonak our  
19 expert, or pointed to statements made by Dr. Witten, and of  
20 course they are more than welcome to question them about it.

21 THE COURT: Exactly.

22 MR. SANTHANAM: If they have an opportunity to do it.  
23 What they shouldn't be allowed to do is come in with new expert  
24 opinions at trial from Dr. Lipton or other witnesses that say,  
25 I know for a fact that this process is going to be X percent

1 more expensive or X percent more efficient. They haven't put  
2 those opinions on the record.

3 THE COURT: Are you directing me to footnote 12?  
4 That's the paragraph in their brief that's giving you some  
5 concerns?

6 MR. SANTHANAM: Footnote ten, Your Honor, at the end  
7 of their brief -- I'm sorry, page ten, footnote 12.

8 THE COURT: I was looking at footnote 12. So direct  
9 me again. "Syngenta's damages expert bases his opinions on the  
10 projected versus actual sales not the incremental benefits."  
11 Is that the sentence that you are worried about or the last  
12 sentence?

13 MR. SANTHANAM: Right.

14 THE COURT: How can I rule on that now? I mean,  
15 we're going to have to get -- I believe Mr. Tiller agreed with  
16 me earlier when I said Mr. Jarosz cannot testify about this  
17 unless there is evidence from somebody who is not an economist.  
18 You know, that kind of begs the question about your evidence,  
19 too. You got to have testimony from people who actually know  
20 something about the science of it, and that's what you are  
21 saying. Well, I don't disagree with that, but I don't  
22 understand how I can make that decision now, when they have at  
23 least put forward some evidence from which the jury, not the  
24 least of which is your own client's manufacturing of this  
25 product for years, which could give rise to the reasonable

1 assumption that therefore it could be done, at least as to the  
2 '761 Patent. You got an easy alternative. I say easy, in  
3 parentheses. Easy to somebody who knew what they were doing  
4 alternative.

5           So, I mean, what are you -- I already said  
6 Mr. Jarosz's opinion can come in, as I believe I said, subject  
7 to foundational evidence, which is what we're talking about  
8 here.

9           I'm not sure -- I'm trying to figure out what it is  
10 you want me to do, what it is you think they are going to do --

11           MR. SANTHANAM: Correct. And, Your Honor, to the  
12 extent that they want to put in Syngenta's evidence,  
13 cross-examine Syngenta's witnesses, we're not contesting that.

14           THE COURT: All right. Okay.

15           MR. SANTHANAM: That's not the purpose of the motion.  
16 What we don't want is for Dr. Lipton to come in, or another  
17 witness of Willowood's to come in at trial and say, I've  
18 analyzed the commercial reasonableness of process A, process B,  
19 process C, and it is commercially reasonable and acceptable  
20 and, therefore, you know, it impacts the damages analysis.  
21 That is what we are moving to exclude.

22           The point of the motion is, they haven't offered any  
23 of those opinions to date. We believe that they will attempt  
24 to do so, and we understand from their opposition brief that  
25 they seek to do so. In fact, they point to Dr. Lipton's

1 testimony -- his report, and they say he has opined on the  
2 manufacturing process, speed of the manufacturing process  
3 saying that it could be done, you know, in a reasonable manner  
4 within a reasonable speed, et cetera. That hints to us that  
5 they are going to come in and try to tell the jury that various  
6 processes are sufficiently efficient, are sufficiently  
7 acceptable in order to amount to a commercially acceptable  
8 process that would fit within the framework of *Minnesota*  
9 *Mining*.

10           So that is -- we've been talking about from the  
11 damages side. I know Your Honor mentioned that there is also  
12 the infringement side to all of these alternatives. Where this  
13 comes in is with regard to the '761 Patent. Willowood's  
14 position in this case has been their manufacturer does not use  
15 DABCO. We put forth testing --

16           THE COURT: I know. I've already been through all of  
17 this. The jury is going to decide this.

18           MR. SANTHANAM: Correct. And they will move to show  
19 that with regard to the DABCO Patent, it is now their burden to  
20 show that their manufacturer did not use DABCO and that this  
21 was not the most commercially reasonable way of doing it.

22           THE COURT: You keep saying, "commercially  
23 reasonable." Where is that in the cases?

24           MR. SANTHANAM: It comes from the foundation for  
25 Section 295 presumption, Your Honor, which is for purposes of

1 establishing that presumption, we put forth expert opinions  
2 from Dr. Fortonak, who will opine that the most commercially  
3 reasonable way of carrying out this manufacturing process is  
4 within the confines of the '761 Patent. If they want to come  
5 back and challenge that, they have not put forth any opinions  
6 on the commercial reasonableness of using that particular  
7 process.

8 THE COURT: Well, they can attack it. There are  
9 other ways for them to attack it, as I recall from the summary  
10 judgment briefing. Is that not the part that I said it is a  
11 little thin?

12 MR. SANTHANAM: If they want to cross-examine our  
13 witnesses, if they want --

14 THE COURT: You are telling me that commercially  
15 reasonable language is used in the cases discussing the 295  
16 presumption?

17 MR. SANTHANAM: Not necessarily in the cases, Your  
18 Honor. It is within the analysis that was put forth by  
19 Syngenta in this case on the 295 presumption.

20 THE COURT: All right. Well --

21 MR. SANTHANAM: Then the last item, Your Honor, is,  
22 we referenced Dr. Wilner's transcript a bunch of times. We  
23 have copies available, if Your Honor would like.

24 THE COURT: I made you give me his report, I think  
25 the last time we were here. I still have it. It is right



1 there. I've read it. You can give me a hard copy and file it  
2 under seal without filing a motion to seal.

3 Go ahead for Willowood.

4 MR. TILLER: I don't think I need to say too much.  
5 If our expert did not offer an opinion, if either of our  
6 experts did not offer an opinion in their reports and it wasn't  
7 culled out during their depositions, then they can't offer it.  
8 If we violate that, then you'll have the opportunity to exclude  
9 that evidence. Presumably there will be an objection to that.

10 What was concerning about the motion was the fact  
11 that despite it being captioned as a motion to exclude certain  
12 expert testimony, the relief that was requested, at least the  
13 way I read it and maybe I read it wrong now that I've heard  
14 Mr. Santhanam argue, was that they were also seeking to exclude  
15 nonexpert evidence. The nonexpert evidence that we're going to  
16 offer and to cross-examine their witnesses on about  
17 non-infringing alternatives are as you already pointed out,  
18 Dr. Witten's own statements, the fact that they themselves made  
19 azoxystrobin without DABCO for a significant period of time.  
20 Other statements that were made and one that -- just so you  
21 know that wasn't mentioned in the briefing, but there was some  
22 back and forth, there was a letter writing campaign between  
23 Syngenta and another manufacturer of azoxystrobin. Those  
24 letters we have here, if you really want to see them, but it  
25 was, hey, you infringed the '138 Patent. The other seller came

1 back and said, no, our azoxystrobin is made pursuant to another  
2 patent that you don't own, that somebody else owns and that --

3 THE COURT: You know, which raises sort of another --  
4 I guess maybe this will raise its head in some other way, but  
5 it was referenced in the brief. There appears to be a  
6 difference of opinions. If somebody out there in the universe  
7 is selling azoxystrobin, which at least has happened at some  
8 point, who has to show what about that?

9 The plaintiff seems to think that the defendant has  
10 to come in here and prove that it's non-infringing and, you  
11 know, that really doesn't make a lot of sense to me. Willowood  
12 seems to say, well, it is not so much that it was being sold,  
13 it is the fact that Syngenta didn't sue them. I don't really  
14 know. I mean, that gets into a lot of other stuff. But the  
15 fact that it is being sold seems to me, to kind of give rise to  
16 a presumption that it's available.

17 MR. TILLER: I would agree.

18 THE COURT: I don't really even have to talk about  
19 who sued them or didn't sue them.

20 MR. TILLER: Your Honor, I agree with you. I agree  
21 with you completely. I was just making the point that they  
22 sent a letter saying, hey, you infringe. The other side came  
23 back and said, no, we don't, and that was basically the end of  
24 it.

25 THE COURT: How are you planning to put that into

1 evidence? Who is going to testify to that?

2 MR. TILLER: I agree we may have issues in that  
3 regard, but I think it is allowed that we could at least  
4 explore it, given the evidence, again, their own letters.

5 So again, I just want to emphasize, we're not -- I'm  
6 not sure where it came from because I thought we said it  
7 extremely clearly, we don't intend to offer expert opinion that  
8 is beyond what we have disclosed. And if we do, you will have  
9 the opportunity to nip that in the bud.

10 What we want to make sure we can do is offer  
11 nonexpert evidence and allow the jury to make the reasonable  
12 inferences from that evidence, just like any other bit of  
13 evidence.

14 THE COURT: Let me make one thing clear. You know, I  
15 talk a lot during these hearings because I have a lot of  
16 questions and I say stuff, but I'm not ruling on anything.  
17 When I say things like, I don't understand how X could be done,  
18 I'm not ruling that X not be done. I'm just giving you the  
19 benefit of my thinking for whatever it is worth, but I'm not  
20 ruling --

21 MR. TILLER: Understood.

22 THE COURT: -- either way. Sometimes people think  
23 I'm going a little bit further than I actually mean to do, but  
24 I like the back and forth and for you all to point out when I  
25 am mistaken about things, or at least to give you the

1 opportunity to do that. Thank you.

2 Any rebuttal?

3 MR. SANTHANAM: Just briefly, Your Honor. So I  
4 directed the Court back to the *Minnesota Mining* case, 976 F.  
5 2d. 1559. In that case, you know, the Court goes through the  
6 *Panduit* factors. This is on page 1577. And says: "To recover  
7 lost profits, the patent holder must demonstrate there is a  
8 reasonable probability that but for the infringement it would  
9 have made --

10 THE COURT: But what?

11 MR. SANTHANAM: That but for the infringement it  
12 would have made the infinger's sales. And it goes through the  
13 *Panduit* factors, but it emphasizes, "however, it is not  
14 necessary for the patent holder to negate all possibilities  
15 that a purchaser might have bought a different product or might  
16 have foregone the purchase all together."

17 In that case, as I had mentioned, the accused  
18 infringer said that they had a potential non-infringing  
19 alternative and the court came down and said the accused  
20 infringer -- this is on page 1578, "the accused infringer had  
21 the opportunity to proffer convincing rebuttal evidence on  
22 non-infringing substitutes and failed to do so. Therefore,  
23 based on the record before us, we conclude that the accused  
24 infringer failed to establish that the master's findings that  
25 there were no acceptable non-infringing alternatives with

1 respect to the patent were clearly erroneous."

2           In the case law before the Federal Circuit -- the  
3 Federal Circuit has recognized, okay, if there are -- you know,  
4 it is the burden of the patentor seeking damages to generally  
5 establish the lack of non-infringing alternatives. If they  
6 come up with alternatives that they say that they could use,  
7 they need to show that it is viable.

8           As part of the opinion -- this is between 1577 and  
9 1578, it says, basically it's -- "the master's findings  
10 indicate that although Beyer might have been entitled to  
11 manufacturing casting tapes," that was the product at issue  
12 under a different set of patents, "it was unable to manufacture  
13 commercially acceptable casting tapes." And the Court noted in  
14 the footnote, "there is no evidence in the record suggesting  
15 that the accusing infringer could have actually purchased a  
16 competitive casting tape from this other provider during the  
17 infringement period."

18           THE COURT: So commercially acceptable, doesn't  
19 that -- I don't know. It sounds to me like what that means is,  
20 something that works. So whatever casting tape is, tape that  
21 casts, I don't know what it is, but whatever it is, you know,  
22 it is something that people would buy because it would work,  
23 not something that -- it doesn't sound like it is exactly the  
24 same as this commercially reasonable phrase you've been using,  
25 which sounds like it means something different to me, and which

1 you, I believe, had been using in a different way.

2           You're not equating those two things, or are you?

3           MR. SANTHANAM: No, Your Honor. There are two  
4 components of it. One is whether it was available to Willowood  
5 and the other is, would it have been a commercially acceptable  
6 way of doing it.

7           THE COURT: Okay. All right. Well, I'll do a  
8 written order on this one, but my expectation is to say, well,  
9 you can't offer expert opinion that wasn't disclosed. Doesn't  
10 really sound like you are intending to, but if and when  
11 Willowood does, all you have to do is object. I'm not going to  
12 let them do that, but that seems like a pretty far narrow  
13 motion. I should be able to deal with that one pretty  
14 straightforwardly without a huge amount of discussion.

15           Let's see. You all submitted verdict sheets  
16 yesterday. They're not as far apart as I suppose they might  
17 be. We'll have a more detailed discussion about that in July.  
18 Let's see, I just printed them this morning because they hadn't  
19 been filed when I left yesterday.

20           You all have conferred, right, and that's why they  
21 are as similar as they are?

22           MR. TILLER: Your Honor, we have conferred, and part  
23 of the issue was all of us were traveling yesterday so we  
24 didn't get like sort of the next opportunity to talk again. So  
25 I think the parties were going to talk to each other to see if

1 we could work that out.

2 MR. LEVIN: We'll try to narrow the disputes in  
3 advance of July the best that we can.

4 THE COURT: That's great. Thank you. Briefly, do  
5 you have -- I assume you have another mediation scheduled  
6 before trial.

7 MR. LEVIN: Formally scheduled, no. When we had the  
8 last session in February, the mediator knew there was briefing,  
9 summary judgment briefing, the motions we've been talking about  
10 today. He basically said, let me know once rulings have come  
11 out on all the various motions and presumably at that point  
12 he'll ask us to schedule another session.

13 THE COURT: So obviously summary judgment is done.  
14 So are you all thinking you need the rulings on today before  
15 you go back to mediation? If you all don't want to settle the  
16 case, that's totally fine with me. But if you are going to  
17 settle, I would rather you do it sooner rather than later, as  
18 I'm sure clients would.

19 I'm thinking if I get the current motion, the one on  
20 Dr. Wilner resolved, that might be a good time for you -- that  
21 you don't really need to wait on all of this stuff that we're  
22 going to take care of in July. I don't know what your motions  
23 in limine are going to be, but bound to be largely details.

24 MR. LEVIN: I think that's fair.

25 THE COURT: Does that seem fair?

1 MR. TILLER: Yes.

2 THE COURT: If I tell you that I will have something  
3 out at least in result, I'm not promising you a opinion, but I  
4 should be able to get you a result by the 19th, or possibly the  
5 morning of the 20th, because then I'm going to be gone for a  
6 little bit and nothing is going to happen. I should be able to  
7 get you a result by then, so if you all could, I would suggest  
8 you go ahead and talk to the mediator, get something scheduled  
9 for July. Then if you don't settle it, we will go forward.

10 Is your mediator somebody local?

11 MR. LEVIN: We hired retired Judge Tevrizian from the  
12 Central District of California.

13 THE COURT: I see. Somebody that actually knows  
14 something about patent law. I encourage you all to do that  
15 before our next conference. I will try to do my part to the  
16 extent the motion on Dr. Wilner helps, though you all are going  
17 to be talking to the jury about a lot of this stuff, obviously,  
18 whatever I do, about Dr. Wilner.

19 Another thing is motions to seal. Let me just say,  
20 you know, our clerk is working on trying to improve logistics  
21 of that in terms of dealing with ECF, but we are limited by the  
22 system. I did see that Syngenta had asked me to seal some  
23 things that were filed by Willowood and I did get that  
24 accomplished, I believe, last night. Ms. Thornton may be able  
25 to assist.



1           I just would encourage you all to give -- to the  
2 extent things are still going to be filed, please try to give  
3 each other plenty of notice that we are going to be using this  
4 in this motion and give people time to respond to that so that  
5 if folks withdraw -- I know there was at least one episode  
6 where Willowood didn't really have a time to say, no, no we're  
7 withdrawing that. It is awful for all of us and I appreciate  
8 that, but I just ask you to really work with each other to  
9 limit the motions to seal and be sure we don't have mixups  
10 where stuff isn't filed under seal that maybe should be and  
11 then where somebody is withdrawing a claim of confidentiality  
12 and then it has to be cleaned up. I would just appreciate  
13 that. I know it is awful for everybody but, you know,  
14 employment for associates, I assume.

15           We will have to deal with at trial the question about  
16 what is going to be made publicly available. The test is  
17 different at trial. It will have to be re-evaluated, all of  
18 these rulings I have made sealing stuff. I do want to talk to  
19 you about that at in July, because once we hit the trial, there  
20 is a pretty significant public interest in open courts. I'm  
21 not saying I won't do something appropriate. I'm just saying  
22 it is higher test and I'll need you all to be prepared to talk  
23 to me about that.

24           Is there anything else? I listed the Rule 54(b)  
25 motion on the copyright claims as a potential topic for July,

1 but I'm just telling you, I may deal with that without oral  
2 argument. The briefing is not complete. I'm not promising you  
3 argument on that. I may not. We'll see in July.

4 Have I forgotten anything that we need to talk about  
5 in July that you know about now for the plaintiff?

6 MR. LEVIN: Nothing for July now, but I do have one  
7 other issue when we're done, if Willowood has anything else for  
8 July.

9 THE COURT: Anything else for July?

10 MR. TILLER: No.

11 MR. LEVIN: The last time you had asked us to give  
12 some thought to this motion to seal issue with ECF and the  
13 difficulty with trying to determine where is the sealed version  
14 on the docket and the unsealed version. We spoke with the  
15 experts within our firm who handle a lot of ECF filings. I  
16 spoke to a number of paralegals who facilitate the major cases  
17 that we handle. Unfortunately, the limitations of ECF are what  
18 they are. The conclusion that we reached was, that the  
19 suggestion and the practice that you asked us to follow of  
20 submitting an index that correlates the confidential version  
21 and nonconfidential version is something that ought to be  
22 required in every case in order to minimize the impact of the  
23 problems created by the limitations of ECF. Ideally, it would  
24 be a modification to the local rule to require that index to be  
25 filed within, say, seven days of the filing of your brief.

1 Recognizing the time constraints that sometimes can come into  
2 play to modify the local rule, the suggestion was that at the  
3 very least an individual judge could make it a standing order  
4 or part of that judge's rules of practice, but we believe based  
5 on all of the input from the people that we spoke to that the  
6 index is the best solution until ECF is modified accordingly.

7 THE COURT: Thank you. That's very helpful. Any  
8 concerns about doing that in this case? I know we don't have a  
9 lot of briefing left to go.

10 MR. TILLER: As long as I don't have to do it  
11 retroactively.

12 THE COURT: No. I think I've dealt with the worst of  
13 it and --

14 MR. TILLER: There shouldn't be much left.

15 THE COURT: It is fairly limited in terms of these  
16 two motions that are pending in front of me now. I suppose it  
17 could still come up in the motions in limine.

18 Let me ask you then in this case if you do have in  
19 the future briefing that requires motions to seal, seven days  
20 after that if you would file an index correlating the redacted  
21 and unredacted, sealed and unsealed version, just so I can --  
22 that will facilitate my review.

23 I will take Mr. Levin's suggestion to our Local Rules  
24 Committee. They keep promising us a new ECF. I walked in the  
25 door and they were talking about it, that was

1 six-and-a-half-years ago.

2 All right. Anything else we can talk about  
3 productively today? I'm so sorry to keep you all late, but I  
4 suspect all of us would prefer to finish before lunch rather  
5 than coming back.

6 No. All right. Thank you so much. We're adjourned.

7 (Court was adjourned at 1:05 p.m.)  
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## C E R T I F I C A T E

I, J. CALHOUN, RPR, United States District Court  
Reporter for the Middle District of North Carolina, DO HEREBY  
CERTIFY

That the foregoing is a true and correct transcript of  
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Date: 6-16-17

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